TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 436

JOSEPH E. OTIS ESTATE LAND TRUST ET AL.,
PETITIONERS,

vs.

IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1936.

CERTIORARI GRANTED NOVEMBER 16, 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1936.

No. 436.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, et al.,
Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, et al.,
Respondents.

Preliminary Statement as to Record.

A petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit was filed herein on behalf of 94 petitioners. On November 16, 1936 certiorari was granted in relation to the nine claims enumerated on page 2 of the petition for certiorari, being those involving qualified releases.

The nine claims are:

Number	Claimant
5235	Excell Trustees
5277	Wm. E. and Warren H. Munk
5286	Simon Lorch
5302	Louise S. Whitcomb and Florence Welch
5304	Abe and Myrtle Schwartz
5312	Isidor A. and Flora L. Rubel
5341	Thos. H. Brown et al.
5406	Herbert and Sigmund Livingston as Trustees
5421	J. E. Nunn

Pursuant to the order granting certiorari, the transcript of the record has been diminished by agreement of counsel, and now contains only that part of the record below pertaining to the nine claims herein as to which certiorari has been granted.

UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, et al.,
Appellants,

IRVING TRUST COMPANY, as Trustee, UNITED CIGAR STORES COMPANY OF AMERICA, LANDLORDS' PROTECTIVE COMMITTEE, PREFERRED STOCKHOLDERS PROTECTIVE COMMITTEE, DEBENTUREHOLDERS PROTECTIVE COMMITTEE, JACOB RUPPERT REALTY CORPORATION, UNITED STORES CORPORATION;
Appellees.

Statement Under Rule XIII.

United Cigar Stores Company of America, a New Jersey corporation, filed a voluntary petition in bankruptcy on August 29, 1932. It was adjudicated a bankrupt in a proceeding in the United States District Court for the Southern District of New York (Docket No. 55129).

On June 9, 1934, United Cigar Stores Company of America filed its petition as a debtor for reorganization pursuant to Section 77B of the Bankruptcy Act, and the said petition was approved on June 14, 1934.

The ninety-four appellants are listed in the table below. The appellees are Irving Trust Company, Trustee of the Debtor's Estate, the Debtor, Jacob Ruppert Realty Corporation, Land-

lords Protective Committee, Preferred Stockholders Protective Committee, Debentureholders Protective Committee, United Stores Corporation.

Each of the appellants filed a claim in the reorganization proceeding above mentioned, and on December 31, 1934 the Trustee filed an objection to each of the said claims and subsequently, by petition and notice of motion, moved to expunge the said claim and bar the claimant from participation in any plan of reorganization confirmed by the Court in these proceedings.

The names of the appellants, the dates of the filing of the proofs of claim and the dates of the filing of the Trustee's objections and the dates of the trial of each of the claims, are as follows*:

Name of Appellant	Date of Filing Proof of Claim	Date of Filing Trustee's Objection	Date of Trial
Abe Schwartz and Myrtle Schwartz	Oct. 8, 1934	Dec. 31, 1934	Apr. 2, 193
William E. Munk and Warren H. Munk	Oct. 8, 1934	Dec. 31, 1934	Apr. 2, 193
Simon Loreh	Oct. 8, 1934	Dec. 31, 1934	Apr. 2, 193
J. E. Nunn	Oct. 10, 1934	Dec. 31, 1934	Apr. 2, 193
Herbert Livingston and Sigmund Livingston	Oct. 10, 1934	Dec. 31, 1934	Apr. 2, 193
Thomas Hassel Brown and Davenport Brown	Oct. 9, 1934	Dec. 31, 1934	Apr. 2, 193
Isidor A. Rubel and Flora L. Rubel	Oct. 8, 1934	Dec. 31, 1934	Apr. 2, 193
Louise S. Whitcomb and Florence Welsh	Oct. 8, 1934	Dec. 31, 1934	Apr. 2, 193
Roy E. Bensley, Fred O. Excell and Stuart W. Excell, as trustees under the last will and testament of Robert Excell, deceased	Oct. 8, 1934	Dec. 31, 1934	Apr. 2, 193 Apr. 29, 193

Hearings on the objections of the Trustee were held before Irwin Kurtz, Referee in Bankruptcy,

* By stipulation of the parties, this tabulation does not include the 85 claims as to which certiorari was not granted.

sitting as Special Master on the dates indicated 7
in the above table. The Special Master filed his report on August 15, 1935, recommending that each of the said ninety-four claims be expunged.

On September 16, 1935, an order was entered in the District Court for the Southern District of New York, approving and confirming the report of the said Special Master and expunging the said claims with certain reservations as to some of the claims. The said order of September 16, 1935, was signed by District Judge Alfred C. Coxe.

The attorneys for each of the said ninety-four appellants are Solomon E. Harrison, Benjamin I. 8
Morris, and Gilbert, Diamond & Brandeis. The attorneys for the debtor are Rosenberg, Goldmark & Colin. The attorneys for the Trustee are Cravath, DeGersdorff, Swaine & Wood. The attorneys for the Landlords Protective Committee are Mitchell, Taylor, Capron & Marsh and Ralph Montgomery Arkush. The attorney for Jacob Ruppert Realty Corporation is M. Carl Levine. The attorneys for Preferred Stockholders' Protective Committee are Shearman & Sterling and Berle & Berle. The attorneys for the Debentureholders' Protective Committee are Davis, Polk, Wardwell, Gardiner & Reed. The attorneys for the United Stores Cor- 9
poration are Sullivan & Cromwell.

By order dated December 2, 1935, Phoenix Securities Corporation became an intervener in this proceeding, and its attorneys are Milbank, Tweed, Hope & Webb.

The ninety-four claimants appeal as a group and an order allowing the appeal was made by District Judge Henry W. Goddard, dated October 15, 1935. Permission to appeal was also granted by the Circuit Court of Appeals on October 21, 1935.

Trustee's Exhibit A, April 1, 1935.

(Marked in evidence at folio 805.)

10

IRVING TRUST COMPANY
RECEIVERSHIP DIVISION
Woolworth Building
New York

Telephone
Rector 2-2800

In the Matter of United Cigar Stores Company of America, Bankrupt

NOTICE TO LESSORS OF REAL PROPERTY LEASED TO THE ABOVE NAMED BANKRUPT

Irving Trust Company, following its appoint-
11 ment as Trustee in Bankruptcy, has been and is now engaged in examining all the leases found in the bankrupt estate. The leases under which the Bankrupt was a tenant fall into two general classes, (a) leases covering premises used exclusively for retail store purposes by the Bankrupt or its subsidiaries, and (b) leases covering premises which were partly or wholly sublet by the Bankrupt.

The first obligation of the Trustee in Bankruptcy must be to determine which of these leases are burdensome and should be rejected to relieve the estate of further losses. Although a reason-
12 able time is allowed the Trustee within which to make such an investigation, the Trustee is endeavoring to complete its examination as soon as possible. As a result of its investigation of leases to date, the Trustee is satisfied that there are some leases which it will be obliged to reject unless the terms thereof can be adjusted. Upon the filing by the Trustee of an application for leave to reject any leases, notice of such application will be given to the respective landlords thereunder. In such cases some landlords may desire an opportunity to acquire the Bankrupt's

lease with a view to preserving sub-tenancies and, so far as it can properly do so, the Trustee will be glad to co-operate. 13

Notice of the Trustee's election will also be given to landlords under any leases which the Trustee may decide to adopt.

Pending its decision to adopt or reject any of the leases now held by the estate, the Trustee recognizes an obligation, as Trustee, to pay the reasonable value, as determined by the Court, of the use and occupancy of such of the premises as it may continue to use and occupy, and to account for any net rentals collected by it from sub-tenants to the landlord in case of rejection. 14

Accordingly, landlords may expect to receive notice in due course of the proposed disposition of their leases by the Trustee and, despite the large number of leases involved, every effort will be made to expedite the investigation now being conducted on behalf of the Trustee. Until such investigation be completed, however, individual landlords will appreciate that it may not be possible for the Trustee to deal with their respective situations immediately. The Trustee desires, however, to take this opportunity of advising landlords that, in the meantime, it does not intend any act or omission on its part to be construed as an election to adopt any lease. 15

September 22, 1932.

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United Cigar Stores Company of America.

Trustee's Exhibit B, April 1, 1935.

(Marked in evidence at folio 807.)

16

IRVING TRUST COMPANY
RECEIVERSHIP DIVISION
Woolworth Building
New York

Telephone
Rector 2-2800

In the Matter of United Cigar Stores Company of America, Bankrupt

October 6, 1932

To the Landlord addressed:

17 *Dear Sir*:

As you have been heretofore advised, United Cigar Stores Company of America has been adjudicated bankrupt and the undersigned has been appointed Trustee in Bankruptcy and is continuing the business under Court order.

The Trustee desires to supplement its general letter to landlords dated September 22, 1932 with the following information concerning those leases which the Trustee has found burdensome to the estate and which must be rejected by the Trustee, unless the terms thereof can be adjusted to the mutual satisfaction of the respective lessors and
18 the Trustee.

The Trustee recognizes an obligation to pay, as Trustee, the reasonable value, as may be determined by the Court, of the use and occupation of any part of the premises continued to be occupied by the Trustee, and, in the interests of all concerned, desires, wherever possible, to fix the amount of such payment by agreement with the respective landlords. Also in cases where such agreements can be reached, it may be desirable to arrange for the modification of the leases on a satisfactory basis and the assignment thereof,

Trustee's Exhibit B, April 1, 1935.

with the consent of the landlords, to the respective State corporations mentioned below, the stores being operated for the time being by the Trustee which will pay the amount agreed on so long as it occupies the premises.

The State corporations referred to above were organized by the bankrupt prior to the bankruptcy with a view to acquiring the cigar stores in the States in which those corporations were formed. This plan had not been consummated at the time of the bankruptcy, but the bankrupt was itself operating its stores through the medium of these State corporations as agents, and the Trustee has continued this arrangement. The State corporations do not own the stores, their only assets consisting of paid in capital, which is nominal. All the stock of the State corporations was owned by the bankrupt and is now held by the Trustee.

While the Trustee at this early stage cannot make any prediction as to the ultimate disposition of the bankrupt estate, the Trustee believes that if the business is disposed of as a going concern or reorganized, it may be desirable for the State corporations holding the modified leases to acquire the stores operated on the premises covered by such leases. The Trustee, however, is not in a position to give assurance that this will be done and cannot assume any liability or obligation in connection with the State corporations or otherwise, except to pay the amount agreed upon so long as the Trustee shall continue to occupy the premises.

In those situations in which premises leased by the bankrupt cover space in addition to the cigar store operated by the bankrupt, the Trustee desires to agree with the landlord upon the elmination of such additional space from the lease. If

the landlord desires an opportunity to acquire
22 the bankrupt's lease with a view to preserving the sub-tenancies, if any, the Trustee will co-operate so far as it can properly do so, and will account to the landlord, as the Court may determine, for any net rentals collected by the Trustee from sub-tenants. The Trustee also desires to agree with the landlord upon the amount to be paid by the Trustee for its use and occupancy of that part of the premises occupied by the cigar store, and for a lease thereof to the appropriate State corporation, if terms mutually satisfactory can be agreed upon.

23 The Trustee believes that the value of the bankrupt estate as a going concern can best be preserved by the arrangements described above. Recognizing, however, that the situations of various landlords may differ, the Trustee feels that the action which any landlord should take in regard to the above is a matter for individual decision, and, accordingly, makes no general recommendation as to the course which any landlord should follow. The Trustee does not intend that any agreement which it may enter into shall constitute an adoption by the Trustee of the lease as the same may now exist or be modified.

24 If you have not already been communicated with regarding the above, a representative of the Trustee will shortly get in touch with you to submit for your consideration the suggested arrangements with respect to your lease, and the Trustee shall appreciate being advised as promptly as possible through such representative whether such arrangements meet with your approval.

Yours very truly,

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United Cigar Stores Company of America.

Trustee's Exhibit C, April 1, 1935.

(Marked in evidence at folio 809.)

November , 1932

Lease No.:
Premises:

Dear Sir:

The undersigned Trustee in Bankruptcy of United Cigar Stores Company of America, Bankrupt, recently notified you of its election to reject all right, title and interest in and to the lease of the above premises to the Bankrupt. The Trustee wishes to call your attention to the fact that its rejection of this lease does not eliminate the interest of the Bankrupt, in either this lease or any subleases thereunder and consequently does not clear your title to the premises or establish your right to any subleases which may have been made by the Bankrupt. There also remains to be settled the matter of the Trustee's accounting to the Lessor for subrents from the premises, less expenses, in respect of the period subsequent to September 1, 1932 collected by the Trustee or Receiver in Bankruptcy prior to the rejection of the lease.

In view of the great number of these situations involved, and the importance to the Trustee in administering the estate under orders of the Bankruptcy Court as well as the importance to the landlords under such leases, of disposing of these matters without delay of court action, the Trustee suggests the following arrangement for your consideration:

1. An assignment to the Lessor or his nominee, of all right, title and interest of the Trustee and of the Bankrupt in the original lease. This assignment clears your title to the property and eliminates the neces-

28 sity of your taking any steps to terminate the Bankrupt's lease which would also terminate any existing subleases and release the subtenants.

2. An assignment to the Lessor or his nominee, of all right, title and interest of the Trustee and of the bankrupt in any subleases of portions of the premises and an assumption of such subleases by the Lessor.

3. An assignment to the Lessor or his nominee, of all claims against subtenants for rent due for the period subsequent to Sep-
29 tember 1st.

4. An agreement by the Trustee to account to the Lessor for all rents in respect of the period subsequent to September 1, 1932, collected from subtenants by the Trustee or the Receiver, deducting from such rents only the expenses of collection, if any, and such expenses as the Trustee or Receiver may have incurred in the operation of the subletting portions of the premises subsequent to the bankruptcy.

30 5. A general release of the Trustee and Receiver, the Bankrupt and the Bankrupt Estate.

Many landlords have decided that it was to their advantage finally to close the entire matter by entering into such an arrangement. We suggest that you give the arrangement your consideration, and if you decide that you wish to take such an assignment and settle the Trustee's obligation on the above basis, please advise us by signing and forwarding the enclosed form. The agreement will then be prepared in this office and for-

warded to you for your approval and execution 31
if satisfactory to you.

Yours very truly,

IRVING TRUST COMPANY,
as Trustee in Bankruptcy of UNITED
CIGAR STORES COMPANY OF AMERICA,
By E. PAUL PHILLIPS.

Trustee's Exhibit D, April 1, 1935.

(Marked in evidence at folio 810.)

Single. 32

November , 1932

Irving Trust Company,
Trustee in Bankruptcy of United
Cigar Stores Company of America.
625 Madison Avenue,
New York, N. Y.

Lease No.

Dear Sirs:

Referring to your letter of
relating to the lease of the premises located at
, please prepare and submit 33
for our consideration a form of agreement as outlined in your letter providing for the assignment of the lease and the payment by the Trustee for use and occupation of a cigar store premises on the basis of 5% of the gross sales. Upon receipt of the agreement we will advise you promptly whether we wish to sign it.

Very truly yours,

Trustee's Exhibit D, April 1, 1935.

34 Single

IRVING TRUST COMPANY
Trustee in Bankruptcy

for

UNITED CIGAR STORES COMPANY OF AMERICA
625 Madison Avenue
At Fifty-Ninth Street
New York, N. Y.

November , 1932.

Lease No.:
35 Premises:

Dear Sir:

The undersigned Trustee in Bankruptcy of United Cigar Stores Company of America, Bankrupt, recently notified you of its election to reject all right, title and interest in and to the lease of the above premises to the Bankrupt. The Trustee wishes to call your attention to the fact that its rejection of this lease does not eliminate the interest of the Bankrupt in this lease and consequently does not clear your title to the leased premises. There also remains to be settled
36 the matter of the Trustee's accounting to the landlord for the period prior to its election to reject the lease, i. e., for the reasonable value of the use and occupation of the premises occupied by the Trustee or the Receiver in Bankruptcy.

In view of the great number of these situations involved, and the importance to the Trustee in administering the estate under orders of the Bankruptcy Court as well as the importance to the landlords under such leases, of disposing of these matters without delay of court action, the Trustee

suggests the following arrangement for your con- 37
sideration:

1. An assignment to the Lessor or his nominee of all right, title and interest of the Trustee and of the Bankrupt in the lease. This assignment clears your title to the property.

2. Payment by the Trustee for the use and occupation of the premises occupied by it or the Receiver of a sum equivalent to 5% of the gross sales of the business conducted on such premises by the Trustee or Receiver 38
subsequent to the bankruptcy.

3. A general release of the Trustee and Receiver, the Bankrupt and the Bankrupt Estate.

Many landlords have decided that it was to their advantage finally to close the entire matter by entering into such an arrangement. We suggest that you give the arrangement your consideration and if you decide that you wish to take such an assignment and settle the Trustee's obligation on the above basis, please advise us by signing and forwarding the enclosed form. The agree- 39
ment will then be prepared in this office and forwarded to you for your approval and execution if satisfactory to you.

Yours very truly,

IRVING TRUST COMPANY,
as Trustees in Bankruptcy of United
Cigar Stores Company of America,
By E. PAUL PHILLIPS.

Trustee's Exhibit E, April 1, 1935.

(Marked in evidence at folio 810.)

40 November , 1932

Lease No.:
Premises:

Dear Sir:

The undersigned Trustee in Bankruptcy of United Cigar Stores Company of America, Bankrupt, recently notified you of its election to reject all right, title and interest in and to the lease of the above premises to the Bankrupt. The Trustee wishes to call your attention to the fact that its rejection of this lease does not eliminate
41 the interest of the Bankrupt, in either this lease or any subleases thereunder and consequently does not clear your title to the premises or establish your right to any subleases which may have been made by the Bankrupt. There also remains to be settled the matter of the Trustee's accounting to the Lessor for the bankruptcy period prior to its election to reject the lease, i. e., for the reasonable value of the use and occupation of any part of the premises occupied by the Trustee or Receiver in Bankruptcy and for any sub-rents, less expenses, collected by the Trustee or
42 Receiver.

In view of the great number of these situations involved, and the importance of the Trustee in administering the estate under orders of the Bankruptcy Court as well as the importance to the landlords under such leases, of disposing of these matters without delay of court action, the Trustee suggests the following arrangement for your consideration:

1. An assignment to the Lessor or his nominee, of all right, title and interest of the Trustee and of the Bankrupt in the original lease. This assignment clears your

title to the property and eliminates the necessity of your taking any steps to terminate the Bankrupt's lease which would also terminate any existing subleases and release the subtenants. 43

2. An assignment to the Lessor or his nominee, of all right, title and interest of the Trustee and of the bankrupt in any subleases of portions of the premises and an assumption of such subleases by the Lessor.

3. An assignment to the Lessor or his nominee, of all claims against subtenants for rents due for the periods subsequent to September 1st. 44

4. An agreement by the Trustee to account to the Lessor for all rents in respect of the period subsequent to September 1, 1932, collected from subtenants by the Trustee or the Receiver, deducting from such rents only the expenses of collection, if any, and such expenses as the Trustee or Receiver may have incurred in the operation of the subletting portions of the premises subsequent to the bankruptcy.

5. Payment by the Trustee for the use and occupation of that portion of the premises occupied by it or the Receiver as a cigar store, of a sum equivalent to 5% of the gross sales of the business conducted in the cigar store by the Trustee or Receiver subsequent to the bankruptcy. 45

6. A general release of the Trustee and Receiver, the Bankrupt and the Bankrupt Estate.

Many landlords have decided that it was to their advantage finally to close the entire matter

46 by entering into such an arrangement. We suggest that you give the arrangement your consideration, and if you decide that you wish to take such an assignment and settle the Trustee's obligation on the above basis, please advise us by signing and forwarding the enclosed form. The agreement will then be prepared in this office and forwarded to you for your approval and execution if satisfactory to you.

Yours very truly,

IRVING TRUST COMPANY,
as Trustee in Bankruptcy of UNITED
47 CIGAR STORES COMPANY OF AMERICA,
By E. PAUL PHILLIPS.

Trustee's Exhibit F, April 1, 1935.

(Marked in evidence at folio 816.)

INSTRUCTIONS.

The following is an outline of the procedure to be followed by the Trustee in dealing with leases which the Trustee has found burdensome to the estate and which must be rejected by the Trustee unless the terms thereof can be
48 *adjusted to the mutual satisfaction of the respective lessors and the Trustee.*

The leases are divided in two classes. CLASS A consists of leases for single stores only. CLASS B consists of those leases where the Bankrupt leased from its landlord more space than it occupied, the balance of the space being sublet.

CLASS A

SINGLE STORES ONLY

The Nature of the Agreement

In these cases the Trustee is suggesting that the landlords enter into an agreement whereby the

rental liability of the Trustee for use and occupancy is fixed, the Trustee assigns the lease to the State Company, and the landlord and the State Company agree to a modification of the terms of the lease. A copy of that form is hereto attached. While an effort has been made to have this form tell the complete story, there is set forth below the reasons for the various provisions therein, which may require an explanation and as to which questions may be raised. 49

State Corporations

In the recitals you will note a representation that the "Tenant", which is the State Company, was organized with a view to the acquisition of a portion of the business of the Bankrupt Company and that the State Company has outstanding the number of shares of stock representing the paid in capital set forth in the agreement. 50

Landlord Must Know Facts

The reason for this is that the landlord should be apprised of all of the facts as to the new company's responsibility so that if the State Company does not, in the future, acquire the business of the bankrupt, the landlord will not have been led to believe that the State Company was a responsible corporation possessed of assets other than its paid in capital. 51

Contemplated Future of State Company

It is believed that it may prove feasible, in case of a sale of the properties as a going concern or reorganization, to have the State Company acquire the business of the Bankrupt or a portion thereof, in which case the State Company will begin business as a corporation possessing only stores which it is anticipated will be profitable,

52 but this, of course, may not happen and extreme care should be observed in conducting negotiations to avoid giving any assurance that it will happen.

Rent to Date

The agreement contains an acknowledgment of the payment of rent to date, which payment will be made as soon as practicable in each case as agreements are consummated and sent in for approval.

Trustee Relieved from Liability

How Rent is Paid

53 Paragraph 5 of this agreement in effect eliminates all possible liability or obligation on the part of the Trustee to the Landlord in connection with this arrangement to which the Landlord should not object, for the reason that in this paragraph the Trustee agrees that so long as it occupies the premises it will cause to be paid the rent provided for in the new arrangement. Therefore, there is no further liability on the part of the Trustee, and it is perfectly proper that it should be released as this paragraph provides.

Possible Acquisition of Business by State Company

54 The statement in Paragraph 5 that the Trustee does not assume any obligation to transfer the store business in the premises to the State Company is included for the reason—that while it is believed that this may prove feasible, the Trustee cannot make any such agreement.

Advantage to Landlord

The Landlord may ask you what he gains in signing this paper. The answer to this is—that he disposes of the question of use and occupation,

places himself at once in a position where he will get a definite rental payment for the premises so long as the Trustee occupies them and if and when a plan of reorganization is worked out no further lease need be signed. If the State Company does not so acquire the business in the premises from the Trustee and for that reason the State Company cannot go ahead, the Landlord can oust the State Company of possession by the usual proceedings which any one could take for the non-payment of rent. 55

Possible Provable Claims by the Landlord

Although it is understood that the Bankrupt Company paid rent falling due on the 1st of August or during the month of August prior to the bankruptcy, there may be cases in which there were amounts owing under the lease at the time of the bankruptcy in respect of back taxes and similar items. In such cases you should insert in the agreement the additional paragraph to the effect that the releases contained in the agreement do not constitute a waiver of the landlord's right to prove any provable claims which he may have. The purpose of this additional paragraph is to give the landlord a right to prove against the bankrupt estate any provable claims, if he has any, but it does not, of course, relieve the landlord from the necessity of proving and obtaining the allowance of such claims or preclude the Trustee from contesting such proof and allowance. You should note that this additional paragraph provides that claims for rent under the lease or damages in respect thereof are not deemed provable claims. 56 57

Get 5% Rentals

In closing a Class "A" deal bear in mind that it is believed that, as a general rule, a rental based

58 on not more than 5% of the sales is *essential* to prevent the leases from constituting a burden on the estate, and the reference in the instructions as to the Class "B" type on the subject of the rental to be worked out for the stores also applies with equal effect to the Class "A" situations.

$1.00 Consideration Must be Paid, and Execution of Agreement

This agreement includes in the consideration clause a payment of One Dollar by the Lessee. This payment must be actually made to the landlord by the man closing the deal at the time of
59 the delivery of the executed copy. Four copies of each agreement should be signed, and acknowledged by the landlord before a notary public.

CLASS B

Leases Where There is Subletting

Description of Subletting Arrangement

In the preceding paragraphs the cases of single stores are covered. The following relates to cases where there is a subletting which will be given up and an effort made to retain the cigar store.

60 Nature of the Agreement

In these cases the use and occupancy agreement hereto attached will be used by which the Trustee agrees that it will pay use and occupancy for the space occupied by the Trustee up to the time that the lease is disaffirmed and obligates itself to pay the actual rents collected from subtenants and to turn over to the landlord when the disaffirmance takes place an assignment or transfer in some proper form of the claims against tenants for uncollected rents, after deducting the expenses set forth in the agreement. The agreement contem-

plates that the Trustee may continue to use and occupy the cigar store on the agreed basis after the lease is disaffirmed and the balance of the premises are given up. 61

Rent to be Fixed for Cigar Store

The amount payable for use and occupancy of the cigar store should be calculated at five per cent. or at such other rental as can be worked out and as may meet with the Trustee's approval. In some cases, it may be necessary to pay a little more than five per cent. Where the store can stand it, you may negotiate a flat rent or a higher percentage rent with a minimum, subject, of course, to approval. It is impossible now to forecast what kind of agreement can be made and it is not intended to fix an absolute maximum of five per cent. in each case although that is what should be accomplished if possible. 62

How and When to Close Cigar Store Lease in Class B Situations

Please note that this use and occupancy agreement does not provide for any lease of the cigar store to the State Company. The reason for this is that it is not practicable to use a modification agreement since the Trustee will usually have to terminate the old lease in order to relieve the estate of the burden of the balance of the premises. Therefore, it is necessary for a new and separate lease to be obtained for the State Company. You are not limited as to the time when to take up the negotiations for the new lease to the State Company. You may find it practicable to close the new lease and the use and occupancy agreement at the same time and in many cases it may be better to settle the question of use and occupancy first and take up the question of a new 63

64 lease for the cigar store at a later date. On the other hand, you may find it practicable at the time when you are arranging for use and occupancy also to negotiate for the new lease of the cigar store to the State Company. For this purpose, a separate form of new lease is attached. You should note that simultaneously with the execution of such new lease the Trustee will either disaffirm the old lease or, if the landlord so desires, arrange in the proper case for an assignment of the old lease and subleases to the landlord. A form of such assignment agreement (described below) is attached, which in effect puts
65 the landlord in a position to make the new lease with the State Company for the cigar store, and to take back the balance of the premises with such subtenancies with third persons as may exist therein. The remarks above with reference to Class "A" situations with respect to the right of the landlord to prove provable claims against the bankrupt estate in case of back taxes and similar items apply equally in this case and the same additional paragraph may be inserted in the assignment agreement under consideration here in the proper cases.

66 Landlord May Acquire Subtenant's Leases and Back Rents.

As pointed out above many landlords in the Class "B" cases will ask that the Trustee, instead of rejecting a lease, place the landlords in possession of the property under such conditions that they will be able to retain the subtenants' leases. The assignment agreement referred to above provides for the assignment to the landlord of the lease and subleases and the uncollected rents owing by the subtenants for the period after September 1st, the landlord assuming the sub-

tenants' leases so that he thereby becomes the landlord of the subtenants. The trustee will consider any request made by the landlord for such an assignment and where the Trustee believes it proper, will apply to the Court for authority to take the requested action. This should not interfere in any manner with procuring the use and occupation agreement which is a separate matter, but the assignment must be arranged for (or the old lease rejected) before the new lease with the State Company is made. 67

The landlord may also arrange upon application to the Trustee to purchase from the Trustee on a fair basis the back rents owed by subtenants up to September 1st to which the landlord has no claim since each landlord received his rents up to September 1st. In many cases a landlord will find this advantageous as it eliminates the occasion for the Trustee to press its claim against the subtenants owing back rents. The landlord, if he acquires these back rents, will then be able to collect them from the subtenants or make such settlements with the subtenants as he may deem advisable. This is also a matter for negotiation between the landlord and the Trustee. 68

69

GENERAL COMMENTS

All Negotiations Subject to the Approval of the Trustee

It is important that you should understand that all negotiations are subject to the approval of the Trustee. All contracts signed by the landlord must be returned to the Trustee's office for final approval by the Trustee and signature by the Trustee and the State Company or Bankrupt Company, as the case may be. You have no authority to sign any agreement on behalf of the Trustee or such other companies.

Trustee's Exhibit F, April 1, 1935.

70 Forms for Percentage Deals

Inasmuch as the agreements finally worked out in both classes "A" and "B" may be a rental based on a straight percentage, or a flat monthly rental or a percentage rental with a minimum, we have provided and attached hereto forms meeting these three types of agreement. It is possible that in some cases legal technicalities may arise so that you may not be able to use the forms as prepared and in such cases you will have to make your arrangement verbally and rely on attorneys to complete the instruments accordingly.

71 No Changes in Forms

Changes in the forms provided are not discretionary. They have been prepared as a result of consideration of the attorneys for the Trustee and you cannot agree to make any changes. If, however, a landlord is absolutely unwilling to take the form as submitted you should communicate this fact promptly. The negotiator has no discretion in this respect and can only state that if changes are insisted on they will be submitted for consideration.

72 Lien States

In all lien States, i. e. States where the landlord has a lien on the contents of the store for unpaid rent, do not get into any discussion with the landlord or his attorney as to what action the Trustee proposes to take. In each such case take the matter up with the Trustee and be advised.

Do not make any statements to any landlord that the store will be closed and the merchandise removed. As soon as you have any difficulty communicate the facts.

Trustee's Exhibit F, April 1, 1935.

Leasing More Space Than Required for Cigar Store 73

There may be exceptional cases where it is absolutely impossible to obtain a single store; where the landlord may insist that more space than is needed for the store be leased. All such cases will have to be submitted to the Trustee before negotiations are concluded or any lease closed. If you are unable to agree with the landlord upon a single store, without taking more space than is needed, submit the matter for consideration and approval by the Trustee.

74

Regional Real Estate Corporations

A number of corporations have been formed which are termed "Regional Real Estate Corporations". It is expected that these corporations may be used in cases where leases are taken for more space than is needed for the cigar store and where there will, therefore, be subletting. In such cases the Regional Company will take the lease and sublet the cigar store space to the State Company. The names of the Regional Companies and the States in which they will function are set forth in the attached schedule.

75

Important

In conferring with landlords, you should always remember that you are acting on behalf of the Trustee in Bankruptcy which is an officer of the United States Court and which, for the time being, is continuing the business of the Bankrupt under court order. You should understand that it is the duty of the Trustee in Bankruptcy under the Bankruptcy Law to reject any leases which are burdensome to the estate, but that the Trustee is anxious to avoid rejecting any lease where

arrangements can be made which are mutually satisfactory to the landlord and the Trustee, and which will make it possible for the Trustee to continue to operate a store on the premises. You should realize that any adjustments in the terms of the existing leases of the bankrupt company involve disappointment to the landlords. The Trustee is anxious that in cases where this situation results in your being unable to negotiate for a new lease for a store which it is desirable to retain, every effort should be made to have the landlord understand the Trustee's position, and if necessary, to have the landlord confer directly with the main office of the Trustee in New York.

The Trustee recognizes that the situations of various landlords may differ, and for this reason the Trustee feels that the action which any landlord should take in regard to his own lease is a matter for individual decision. Accordingly, the Trustee makes no general recommendation as to the course which any landlord should follow.

Claimant's Exhibit 1, April 1, 1935.

(Marked in evidence at folio 790.)

(Brown Form)

ASSIGNMENT AND AGREEMENT, made this day of , 193 , between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in Bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter called the "Trustee"), party of the first part; UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a New Jersey corporation, having an office at 625 Madison Avenue, Borough of Manhattan,

Claimant's Exhibit 1, April 1, 1935.

City and State of New York, (hereinafter called 79
the "Bankrupt"), party of the second part;
of
(hereinafter called the "Landlord"), party of the
third part; and
, of
, a corporation of the State of
(hereinafter
called the "Tenant"), party of the fourth part.

WHEREAS, by instrument (hereinafter called the "Lease"), dated
there was demised to the Bankrupt the premises
(hereinafter called the "Premises"), located at 80
, in the City of
, State of
described in the Lease, of which Premises the party of the third part is the Landlord, for a term commencing
and expiring ;
and

WHEREAS, the Bankrupt has heretofore been adjudged a bankrupt and the Trustee was appointed Receiver and thereafter elected Trustee of the Bankrupt's estate and is now qualified and acting as such Trustee; and 81

WHEREAS, the Trustee rejected the lease on
, 1932, pursuant
to an order of the Honorable Irwin Kurtz, dated
, 1932; and

WHEREAS, the Tenant represents that it was heretofore organized with a view to the acquisition of a portion of the retail store business of the Bankrupt, that it has outstanding
shares of stock representing
$ paid in capital, all of which was owned by the Bankrupt and is now

held by the Trustee, and that it desires to obtain an assignment of the Lease and the right to carry on business on the Premises under the terms of the Lease modified as hereinafter provided;

NOW, THEREFORE, in consideration of the sum of One ($1.00) Dollar, to the Landlord in hand paid, receipt whereof is hereby acknowledged by the Landlord, and in consideration of the agreements of the parties herein designated, it is agreed as follows:

FIRST: The agreements herein contained shall be binding upon and inure to the benefit of the heirs, successors, legal representatives and assigns of the parties hereto.

SECOND: The Bankrupt hereby assigns, transfers and sets over unto the Tenant, its successors and assigns, all of its right, title and interest, in and to the LEASE, TO HAVE AND TO HOLD the same unto the Tenant, its successors and assigns, from and after September 1, 1932, for the residue of the term thereof, subject to the terms, covenants and conditions therein mentioned.

THIRD: The Landlord hereby consents to the foregoing assignment of the Lease by the Bankrupt to the Tenant, upon the condition, however, that this consent shall not be deemed a waiver for the future by the Landlord of any existing restriction in the Lease against the assignment thereof by the Lessee.

FOURTH: The Landlord and the Tenant agree that the Lease shall be, and the same hereby, is modified and amended, as from September 1, 1932, as follows:

FIFTH: The Tenant hereby accepts said assignment of the Lease and agrees with the Land-

Claimant's Exhibit 1, April 1, 1935.

lord that it will assume, and does hereby assume, 85
the Lease as so modified, and agrees to be bound thereby and to observe, carry out and perform the terms, covenants and conditions therein contained on the part of the Lessee thereunder to be observed, carried out and performed. The Landlord does hereby acknowledge receipt of the payment of all rent under the Lease accrued thereunder up to the date hereof.

SIXTH: The Trustee shall have the right in its discretion, to use and occupy the Premises and conduct the business thereon, either directly or through its agents, and the Trustee agrees that, 86
so long as it shall in its discretion so use and occupy the Premises, it will pay or cause to be paid to the Landlord the rent or the pro rata part thereof reserved by the Lease as modified as above provided in respect of the period of such use and occupancy. Neither such use and occupancy nor any other act or failure to act on the part of the Trustee or its representatives shall constitute an adoption of the Lease or the modified Lease by the Trustee. It is expressly understood and agreed by the Landlord that the Trustee is not in a position to assume, and does not assume, any obligation to transfer or cause to be transferred to the 87
Tenant the store business being conducted on the Premises or the merchandise located thereon or any other property, and that, except as hereinbefore in this Article SIXTH provided, neither Irving Trust Company individually or as Receiver and/or as Trustee, nor the Bankrupt nor its estate, shall be under any obligation or liability of any kind in respect of the Lease, either as originally entered into or as modified as above provided, any such obligation or liability being hereby released by the Landlord, and that, except

as aforesaid, the Landlord will look solely to the Tenant for the payment of rent and the performance of the other obligations under the Lease as so modified. The Landlord and the Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not affect in any manner the full force and validity of the rejection of the Lease by the Trustee.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment and Agreement, or caused it to be executed in their respective names, as of the day and year first above written.

IRVING TRUST COMPANY,
As Trustee in Bankruptcy of United Cigar Stores Company of America,

by.....
Ass't Secretary.

UNITED CIGAR STORES OF AMERICA,

by.....
Vice-President.

.....
Landlord.

.....
Tenant.

by.....
President.

State of New York
County of New York—ss.:

On this day of , 1932, before me personally appeared JOSEPH T. STEARNS to me known, who

being by me duly sworn, did depose and say that 91
he resides in New York City; that he is one of the Assistant Secretaries of IRVING TRUST COMPANY, the corporation described in and which executed the foregoing instrument as Trustee in Bankruptcy; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

92

State of
County of —ss.:

On this day of
, 1932, before
me personally appeared
to me known and known to me to be the individual described in, and who executed the foregoing instrument and acknowledged to me that
executed the same as
free act and deed.

Claimant's Exhibit 2, April 1, 1935. 93

(Marked in evidence at folio 791.)

(Gray form.)

ASSIGNMENT AGREEMENT, made this day of , 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part,

of
(hereinafter called the Landlord), party of the

Claimant's Exhibit 2, April 1, 1935.

second part and UNITED CIGAR STORES COMPANY
94 OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated (hereinafter called the Lease), covering certain premises located at

(hereinafter called the Premises), for a term commencing and expiring
95

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly ap-
96 pointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated , 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

Claimant's Exhibit 2, April 1, 1935.

NOW, THEREFORE, in consideration of the 97
premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

SECOND: The Bankrupt hereby assigns to any and all of the right, title and interest of the Bankrupt in and to the Lease 98
and in and to said agreements of sublease, including any and all of the right, title and interest of the bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs 99
and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obliga-

100 tions, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby as-
101 signed and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises, and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses,
102 claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises.

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores

Claimant's Exhibit 2, April 1, 1935.

Company of America, with respect to the Lease or 103
any agreement of sublease hereby assigned and
does not assume the Lease or any agreement of
sublease or any responsibility therefor or other-
wise.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
Trustee in Bankruptcy of United
Cigar Stores Company of America, 104

By .....
Assistant Secretary.

.....
Landlord.

UNITED CIGAR STORES COMPANY
OF AMERICA,

By .....
Vice-President.

SCHEDULE OF SUBLEASES: 105

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On this day of , in the year nineteen hundred and thirty , before me personally came ,
to me known, who being by me duly sworn, did depose and say that he resides in ; that he is one of the Vice-Presidents of the UNITED CIGAR STORES COMPANY OF AMERICA, the corporation described in and

which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this day of , in the year nineteen hundred and thirty , before me personally came , to me known, who being by me duly sworn, did depose and say that he resides in ; that he is the of the IRVING TRUST COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF }
COUNTY OF } ss.:

On this day of , in the year nineteen hundred and thirty , before me personally came , to me known, who being by me duly sworn, did depose and say that he resides in ; that he is the President

Claimant's Exhibit 3, April 1, 1935.

of

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the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF }
COUNTY OF } ss.

110

On this day of , in the year nineteen hundred and thirty ; before me personally came

,

to me known to be the individual described in, and who executed the above instrument, and acknowledged that he executed the same.

Claimant's Exhibit 3, April 1, 1935.

(Marked in evidence at folio 792.)

(White Form.)

111

October , 1932.

IRVING TRUST COMPANY,
as Trustee in Bankruptcy
of UNITED CIGAR STORES
COMPANY OF AMERICA,
625 Madison Avenue,
New York, N. Y.

Dear Sirs:—

The undersigned is the Landlord of the premises situated at

(hereinafter called the Premises) in

Claimant's Exhibit 3, April 1, 1935.

which United Cigar Stores Company of America
112 is a Tenant under a lease dated

The undersigned hereby agrees to allow you as Trustee in Bankruptcy to continue to use and occupy that part of said Premises constituting a cigar store (hereinafter called the "cigar store premises") directly or through a subsidiary of the Bankrupt Estate as your Agent, upon the following terms and conditions:—

1. Your obligation as Receiver and Trustee to the undersigned in respect of said Premises shall be determined, paid and discharged as follows:—
113

(a) You shall pay to the undersigned within thirty (30) days after any rejection of said lease by you, an amount equal to the aggregate of any and all rents, water charges and other payments collected by you or your agents from the various sublessees in said Premises (exclusive of the rent for the cigar store premises) accruing under said subleases from and after September 1, 1932;

(b) You shall pay, in addition to the
114 foregoing, as the reasonable value of the use and occupancy of said cigar store premises from and after September 1, 1932, compensation at the following rate:

(c) You shall assign and transfer to the undersigned or its nominees, within thirty (30) days after any rejection of said lease, all of your right, title and interest in and to any and all uncollected rents, water charges and other payments due on and after September 1, 1932, from sublessees of portions of said Premises other than said cigar store premises.

Claimant's Exhibit 3, April 1, 1935.

(d) From any sums due and payable by you to the undersigned under sub-divisions (a) or (b) hereof, you shall have the right to deduct all expenses incurred in the operation and management of the said Premises, including payments made or expenses incurred by you for (1) commissions for collection of sub-rents and other charges; (2) repairs; (3) gas, electricity, heat and water charges; (4) attorneys' fees and court costs and (5) insurance premiums. None of the foregoing expenses, however, may be deducted by you if incurred exclusively in the operation or maintenance of said cigar store premises. Any remittance by you shall be accompanied by a statement of said expenses, if any. 115 116

2. The undersigned agrees that the necessity for the institution of any actions for rent or to recover possession of any portion of said Premises shall lie in your discretion and you shall not be liable for any failure, neglect or omission arising or growing out of or in anywise relating to the operation or management of said Premises, except through any gross negligence on your part. It is agreed that no act of yours whatsoever (except written notice of adoption) shall constitute an adoption of said lease. 117

3. In the event that you shall reject said lease, the undersigned agrees that you may continue to occupy said cigar store premises for such period of time as you shall desire, provided, however, that the undersigned can terminate such right of occupancy at any time after such rejection upon thirty (30) days' prior written notice to you. You shall pay to the undersigned for the value of

your use and occupancy of said cigar store
118 premises after such rejection compensation at the rate provided in paragraph "1", subdivision (b) hereof, such payment to be made to the undersigned monthly. In the event that you shall vacate said cigar store premises before the expiration of any full month, the charge for such portion of a month shall be apportioned and paid on a pro-rata basis. The undersigned agrees that your occupancy of said cigar store premises after any rejection of said lease, shall not affect the validity of such rejection nor impose upon
119 you any liability by reason of such occupancy other than your liability to pay the use and occupancy charge for the period of your occupancy as herein provided.

4. In the event that you shall elect to adopt said lease, this agreement shall be null and void and any payments theretofore made by you pursuant to the terms hereof shall be applied to your credit upon any rents in arrears under said lease.

Please indicate your agreement to all of the foregoing, by signing this letter at the foot hereof
120 and thereupon this letter shall constitute an agreement of the parties hereto.

Very truly yours,

.....

Landlord.

ACCEPTED:

IRVING TRUST COMPANY,
as Trustee in Bankruptcy
of UNITED CIGAR STORES
COMPANY OF AMERICA,

By.....

Claimant's Exhibit 4, April 1, 1935.

(Marked in evidence at folio 793.)

(Blue Form.) 121

ASSIGNMENT AGREEMENT, made this day of , 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, of (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of 122 the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated (hereinafter called the Lease), covering certain premises located at (hereinafter called the Premises), for a term commencing and expiring

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written 123 agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated

, 1932, the Trustee was authorized to reject
124 the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

125 FIRST: The Trustee hereby assigns to
any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

SECOND: The Bankrupt hereby assigns to
any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after Sep-
126 tember 1, 1932 under said agreements of sublease.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and manage-

ment of the Premises other than that portion thereof operated as the cigar store, including 127
payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or 128
upon the part of the Trustee.

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and 129
occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims

or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United Cigar Stores Company of America,

By .....
Assistant Secretary.

.....
Landlord.

UNITED CIGAR STORES COMPANY OF AMERICA,

By .....
Vice-President.

Claimant's Exhibit 4, April 1, 1935.

SCHEDULES OF SUBLEASES:

.133

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On this day of , in the year nineteen hundred and thirty , before me personally came , to me known, who being by me duly sworn, did depose and say that he resides in ; that he is one of the Vice-Presidents of the UNITED CIGAR STORES COMPANY OF AMERICA, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; 134 that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On this day of , in the year nineteen hundred and thirty , before me personally came , 135 to me known, who being by me duly sworn, did depose and say that he resides in ; that he is the of the IRVING TRUST COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

Claimant's Exhibit 4, April 1, 1935.

136 STATE OF
COUNTY OF } ss.

On this day of , in the year nineteen hundred and thirty , before me personally came ,
to me known, who being by me duly sworn, did depose and say that he resides in ; that he is the President of ,
the corporation described in and which executed the above instrument; that he knows the seal of
137 said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF
COUNTY OF } ss.

On this day of , in the year
138 nineteen hundred and thirty , before me personally came ,
to me known to be the individual described in, and who executed the above instrument, and acknowledged that he executed the same.

Claimant's Exhibit 5, April 1, 1935.

(Marked in evidence at folio 794.)

(Yellow Form.)

139

ASSIGNMENT AGREEMENT, made this day of , 1932, between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in Bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the "Trustee"), party of the first part,

of (hereinafter called the "Landlord"), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the "Bankrupt"), party of the third part.

140

1. The Bankrupt is the Lessee under a written agreement of Lease dated (hereinafter called the "Lease"), whereby there was leased to the Bankrupt certain premises located at

(hereinafter called the "Premises"), for a term commencing and expiring

141

2. By order of the United States District Court for the Southern District of New York, dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver for the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

3. By order of Honorable Irwin Kurtz, Referee in Bankruptcy dated , 1932, the Trustee was authorized to reject the Lease and to abandon the fixtures and furnishings con-

142 tained in the Premises formerly operated as a store by the Bankrupt, or in lieu of such rejection of the Lease and/or abandonment of said fixtures and furnishings, and upon the request of the Landlord to assign to the Landlord or its nominees, any and all right, title and interest of the Trustee in and to the Lease and/or in or to said fixtures and furnishings, and the Landlord has requested such assignment.

NOW, THEREFORE, in consideration of the premises and the assignment herein made and the mutual covenants and agreements herein con-
143 tained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to

[Insert name of Landlord or of Landlord's nominee]

any and all right, title and interest of the Trustee in and to the Lease and in and to said fixtures and furnishings now located in the Premises.

SECOND: The Bankrupt hereby assigns to

[Insert name of Landlord or of Landlord's nominee]

any and all right, title and interest of the Bankrupt in and to the Lease and in and to said
144 fixtures and furnishings.

THIRD: The Landlord hereby releases Irving Trust Company, individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from all liability of any nature with respect to the Lease and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupancy, if any, of the Premises, and the Landlord agrees to exonerate, indemnify and hold

harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy, and the Bankrupt, from and against any and all liability of any nature now existing or which may hereafter arise, out of or in connection with the Lease and fixtures and furnishings hereby assigned, or the Premises. 145

FOURTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or with respect to the fixtures and furnishings hereby assigned to the Landlord, and does not assume the Lease or any responsibility therefor or otherwise. 146

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
Trustee in Bankruptcy of
United Cigar Stores
Company of America, 147

By.....
Assistant Secretary.

.....
Landlord.

UNITED CIGAR STORES COMPANY OF AMERICA,

By.....
Vice-President.

Claimant's Exhibit 5, April 1, 1935.

148 State of New York,
County of New York—ss.:

On this day of , 1932, before me personally appeared to me known, who being by me duly sworn, did depose and say that he resides in ; that he is one of the Assistant Secretaries of IRVING TRUST COMPANY, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such cor-
149 porate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

State of New York,
County of New York—ss.:

On this day of , 1932, before me personally appeared to me known, who being by me duly sworn, did depose and say that he resides in ; that
150 he is one of the Vice-Presidents of UNITED CIGAR STORES COMPANY OF AMERICA, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Claimant's Exhibit 6, April 1, 1935.

(Marked in evidence at folio 795.)

(Green Form.)

ASSIGNMENT AGREEMENT, made this day of , 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, of (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated . (hereinafter called the Lease), covering certain premises located at (hereinafter called the Premises), for a term commencing and expiring

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

Claimant's Exhibit 6, April 1, 1935.

154 4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated , 1932, the Trustee was authorized to reject the Lease and abandon the fixtures and furnishings, if any, contained in that portion of the Premises formerly operated as a store by the Bankrupt, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all rights, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease and said fixtures and furnishings, if any.
155 Pursuant to said order the Trustee rejected the Lease on , 1932, the Landlord not having theretofore requested such assignment.

5. The Landlord now desires to obtain an assignment of the Lease and agreements of sublease from the Bankrupt and to agree with the Bankrupt and Trustee with respect to the matters hereinafter set forth.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the
156 parties hereto agree as follows:

FIRST: The Trust hereby assigns to [Insert name of Landlord or Landlord's nominee] any and all of the right, title and interest of the Trustee in and to all fixtures and furnishings contained in that portion of the Premises formerly operated as a store by the Bankrupt.

SECOND: The Bankrupt hereby assigns to [Insert name of Landlord or Landlord's nominee] any and all of

the right, title and interest of the Bankrupt in 157
and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease, and in and to any and all of said fixtures and furnishings.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, 158
from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the 159
amount of such rent, if any, theretofore paid to the Landlord.

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt.

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of

Claimant's Exhibit 6, April 1, 1935.

160 United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease, said agreements of sublease and said fixtures and furnishings, if any, hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises, and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity
161 as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease and fixtures and furnishings, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises.

SIXTH: The Landlord and the Bankrupt hereby
162 jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease or any fixtures and furnishings hereby assigned and has not assumed and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise. The Landlord and the Bankrupt further jointly and severally covenant and agree that

the execution and delivery by the Trustee of this Assignment Agreement does not affect in any manner the full force and validity of the rejection of the Lease by the Trustee. 163

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United Cigar Stores Company of America 164

By.....
Assistant Secretary.

.....
Landlord.

UNITED CIGAR STORES COMPANY OF AMERICA,

By.....
Vice-President.

SCHEDULE OF SUBLEASES 165

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this day of , in the year nineteen hundred and thirty , before me personally came , to me known, who being by me duly sworn, did depose and say that he resides in ; that he is one of the Vice-Presidents of the UNITED CIGAR STORES COMPANY OF AMERICA, the corporation described in and which executed the above instrument; that he knows the seal of said corpora-

166 tion; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

On this day of , in the year
167 nineteen hundred and thirty , before me personally came JOSEPH T. STEARNS, to me known, who being by me duly sworn, did depose and say that he resides in New York City; that he is the Assistant Secretary of the IRVING TRUST COMPANY, the corporation described in and which executed the above instrument, as Trustee in Bankruptcy; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like
168 order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF }
COUNTY OF } SS.:

On this day of , in the year nineteen hundred and thirty , before me personally came , to me known, who being by me duly sworn, did depose and say

that he resides in ; that he 169
is the President of , the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF
COUNTY OF } ss.: 170

On this day of , in the year nineteen hundred and thirty , before me personally came to me known and known to me to be the individual described in, and who executed the foregoing instrument and acknowledge to me that executed the same as free act and deed.

171

172 **Proof of Claim of Abe Schwartz, et al. (No. 5304).**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59886—Proof of Claim.

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173 In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

At the City of Waukegan, County of Lake, State of Illinois, on the date hereinafter set forth, came ABE SCHWARTZ and MYRTLE SCHWARTZ, his wife and made oath and says that:

174

I.

For an Individual.

We are the claimant. Our address is 28 N. Genesee Street, Waukegan, Ill.

II.

United Cigar Stores Company of America, the corporation which is the debtor in the above-

entitled proceeding for reorganization (hereinafter called the Debtor), on August 29, 1932, filed its voluntary petition in bankruptcy and was adjudicated a bankrupt in a proceeding in the above-mentioned Court (Docket No. 55129), and Irving Trust Company was appointed trustee in bankruptcy of said bankrupt and acted as such trustee in bankruptcy (herein called the Trustee in Bankruptcy) until June 14, 1934, the date of approval of the petition herein. 175

The claimant is the present owner of a claim against the Debtor, based upon or arising out of the lease, dated April 20, 1920, between Samuel Schwartz (entire Three story and basement building located N. E. Washington and Genesee Streets, Waukegan, Illinois) as Landlord, and the Debtor, as Tenant, covering the premises described therein, for a term commencing prior to August 29, 1932, and ending on April 30, 1945, or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy on or about August 31st, 1932, or for damages or indemnity under a covenant or covenants contained in said lease. 176

The Trustee in Bankruptcy surrendered the premises covered by said lease on August 31st, 1932. 177

[Insert date on which possession of premises was turned over, or, if that date is not known, insert date of notice from Trustee in Bankruptcy that lease was rejected:]

The landlord reentered said premises on September 1st, 1932.

Except to the extent hereinafter shown, neither the Debtor nor the Trustee in Bankruptcy has

178 paid the rent or other obligations accruing under said lease after the 31st day of August, 1932.

[If the claimant is not the landlord named in the above-described lease, give explanation of how ownership of the claim was acquired, *i. e.*, by purchase of the premises, assignment, inheritance, or otherwise:]

Claimant acquired premises in question by purchase.

III.

The Debtor was on and before June 14, 1934, the date of the approval of the petition herein,
179 and still is, justly and truly indebted to the claimant for amounts payable under said lease or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy or for damages or indemnity under a covenant or covenants contained in said lease, computed as follows:

Total net or fixed rent for entire term which has not been paid by the Debtor	$139,333.32
Total taxes, insurance, assessments, water rents or rates and other payments
180 required to be made by Debtor for entire term which have not been paid by the Debtor (use actual amounts so far as known and estimates for the future—see footnote 1)	$59,269.22
Total lease obligations which have not been paid by the Debtor	$198,602.54

Less:			181
Fair rental value of leased premises from date of rejection of lease to end of term (see footnote 2)	$134,609.18		
Dividends paid in bankruptcy proceeding, on any claim based on original lease	$1,367.28		
Amount paid by Trustee in Bankruptcy for use and occupation of premises by such trustee	$ None		182
Amounts paid by subtenants of Debtor to landlord under original lease for occupancy up to date of rejection of lease	$ None	$135,976.46	
Total amount claimed for entire term of original lease		$62,626.08	

Claim is hereby made against the Debtor in the amount above set forth, together with such interest thereon as may be allowed by law.

1. Explain how future taxes, etc., are estimated: 183

2. If all or any part of the leased premises was relet to another tenant for all or any part of the balance of the term of the original lease, the terms of the new lease should be taken into consideration in making this estimate; a copy of the new lease should be attached to this proof of claim, marked Exhibit A, and the following information should be supplied:

Name of new tenant:
Date of commencement of term of new lease:
Date of expiration of term of new lease:
Net or fixed rent per year under new lease: $
Taxes, and other payments per year under new lease: $
Explain how future taxes, etc., are estimated;
State also any other facts on which estimate of fair rental value is based, stating such facts, if necessary, on a separate page as a schedule hereto:

184 IV.

This claim in the amount above set forth, together with interest thereon as aforesaid, is allowable on a parity with debts which would be provable under Section 63 (a) of the Bankruptcy Act to the extent of the amount provided in subdivision (b) of Section 77B of the Bankruptcy Act, which said amount is computed as follows:

185	Net or fixed rent accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	$ None
	Taxes, assessments, insurance, water rents or rates and other payments accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	$3,038.39
186	Total lease obligations accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	$3,038.39
	Less:	
	Dividends paid in the bankruptcy proceeding on any claim based on original lease	$1,367.28

Proof of Claim of Abe Schwartz, et al. (No. 5304).

Amount paid by Trustee in Bankruptcy for use and occupation of premises by said trustee	$ None		187
Amounts paid by subtenants of Debtor to landlord under original lease for occupancy up to date of surrender of premises or date of reentry by landlord, whichever first occurred	$ None	$1,367.28	
Unpaid lease obligations accrued up to date of surrender or reentry, whichever first occurred		$1,671.11	188
Net or fixed rent reserved in lease (without acceleration) for three years next succeeding date of surrender of premises or date of reentry by landlord, whichever first occurred, or for entire balance of term if less than three years	$33,000.00		189
Taxes, assessments, insurance, water rents or rates and other payments to be made by Debtor during three years next succeeding date of surrender of premises or date of reentry by landlord, whichever first occurred, or for entire balance of term if less than three years	$13,180.42		

190 Total lease obligations for three year period above described, or for entire balance of term if less than three years $46,180.42

Total amount of claim allowable under Section 77B on a parity with debts which would be provable under Section 63 (a) $47,851.53

Claim is hereby made against the Debtor in the
191 amount above set forth, together with such interest thereon as may be allowed by law, on a parity with debts which would be provable under said Section 63 (a).

V.

To the extent that the total amount of the claim for the entire term of the original lease, as hereinabove set forth in subdivision III hereof, is not allowable on a parity with debts which would be provable under said Section 63 (a); said claim should be allowed in subordination to debts so provable, but in priority to the claims or interests
192 of holders of preferred and common stock of the Debtor.

VI.

No part of the claim herein asserted has been paid, and there are no setoffs or counterclaims thereto except as follows:

The claimant has not nor has any person for or on behalf of the claimant, to deponent's knowl-

edge or belief, had or received, for the use or 193
benefit of the claimant, any security for said debt, except as follows:

No judgment has been rendered therefor, nor for any part thereof, but a claim based on said lease was filed in said bankruptcy proceeding and was allowed in the amount of $ None.

In executing and filing this proof of claim, the claimant in no way waives any rights which the claimant may have to reclaim specific assets and 194
expressly reserves such rights.

Name ABE SCHWARTZ (L. S.)
(Individual)

Name MYRTLE SCHWARTZ
(Individual)

Affix Corporate Seal

Address to which all notices should be mailed:

Solomon E. Harrison
Benjamin I. Morris
134 N. LaSalle Street 195
Chicago, Illinois

Subscribed and sworn to before me
this 22 day of September, 1934.

VIOLET ROOS,
Notary Public,
Lake County, Ill.

Proof of Claim of Abe Schwartz, et al. (No. 5304).

196 UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59886—Proof of Claim.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

197

To Benjamin I. Morris and Solomon E. Harrison:

We, ABE SCHWARTZ and MYRTLE SCHWARTZ, of Waukegan in the County of Lake and State of Illinois, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings,
198 or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for us and in our names to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for us to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings

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of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due us under any composition, and for any other purpose in our interest whatsoever, with full power of substitution.

IN WITNESS WHEREOF, we have hereunto signed our names and affixed our seal the 22nd day of September, A. D. 1934.

200

ABE SCHWARTZ (Seal)
MYRTLE SCHWARTZ (Seal)

ACKNOWLEDGED before me this 22 day of September, A. D. 1934.

VIOLET ROOS,
Notary Public.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

BY THIS INDENTURE, executed this 20th day of April, 1920, in consideration of the rent and covenants herein reserved and contained, entered into by the parties hereto for themselves, their respective heirs, administrators, successors, legal representatives and assigns, SAMUEL SCHWARTZ, hereinafter jointly, severally and collectively called the Lessor, residing at 836 Sheridan Road, City of Waukegan, State of Illinois, doth lease and demise unto UNITED CIGAR STORES COMPANY OF AMERICA, incorporated under the laws of the State of New Jersey, having an office at 1543 West 15th Street, Chicago, Illinois, hereinafter called the Lessee,

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Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199a

the entire three story and basement building, located at the Northeast corner of Washington and Genesee Streets, having a frontage on Washington Street of about 35 feet and a frontage on Genesee Street of about 69 feet, said building being commonly known as the Schwartz Building, together with all additions thereto and appurtenances thereof, situated in the City of Waukegan, County of Lake, and State of Illinois, with the appurtenances, to be used as a cigar store, and for the sale of such sundry merchandise as is

200a

or may be dealt in generally by Lessee.

TO HAVE AND TO HOLD the premises hereby demised unto the Lessee, its successors and assigns for the term commencing May 1, 1920, and expiring April 30, 1945,

YIELDING AND PAYING THEREFOR The term rent of Two Hundred and Sixty-six Thousand Dollars ($266,000.00) payable as follows:

A yearly rent of Eight Thousand Dollars ($8,000.00) for each of the two years of said term, beginning on May 1, 1920, and ending on

201a

the 30th day of April, 1922, payable in equal installments of Six Hundred and Sixty-six Dollars and sixty-seven cents ($666.67) each in advance on the first day of each and every month during the said two years; a yearly rent of Ten Thousand Dollars ($10,000.00) for each of the following three years of said term, beginning on May 1, 1922, and ending on the 30th day of April, 1925, payable in equal monthly installments of Eight Hundred Thirty Three and 33/100 Dollars

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199b

($833.33) in advance on the first day of each and every month during said three years; and a yearly rent of Eleven Thousand Dollars ($11,000.00) for each of the remaining twenty (20) years of said term, beginning on May 1, 1925, and ending on the 30th day of April, 1945, payable in equal monthly installments of Nine Hundred Sixteen and 67/100 Dollars ($916.67) in advance on the first day of each and every month during the said twenty (20) remaining years of said term.

Attached to and forming part of lease made between United Cigar Stores Company of America and Samuel Schwartz Dated 4/20/20. 200b

SAMUEL SCHWARTZ
D. E. BLOCK

And the Lessee does hereby covenant with the Lessor, that the Lessee, during the said term will pay to the Lessor, the said rent at the times and in the manner aforesaid and will keep the said premises in as good order and repair as when delivered to it, damage by fire or other casualty or happening excepted; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, but provided that in the event that any of said glass shall be broken or damaged by any cause before the commencement of the term herein demised, the same shall be replaced at the expense of the Lessor, and at the expiration of the term the Lessee will remove its goods and effects, and will peaceably yield up to the Lessor, the said premises, in as good order and repair as when delivered to it, damage by fire, casualty or 201b

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199c act on the part of any governmental authority, ordinary wear and tear and damage by the elements excepted.

That the Lessee will not assign this lease without the written consent of the Lessor but may sublet the demised premises or any part thereof for any lawful business which shall not be extra hazardous on account of fire, or conflict with the business of other store tenants, if any, in the same building.

That during the term the Lessee will not consent that said premises be overloaded or damaged,
200c or that any trade or occupation shall be carried on upon the said premises or any use made thereof which shall be unlawful or contrary to any law of the State or ordinance or by-law of the City for the time being in force; that no act or thing shall be persisted in upon the said premises, which will make void or voidable any insurance on the said premises or building against fire, and the Lessee shall have the right to make alterations, changes and improvements to and remodel the premises, inside and outside, at its own expense, provided that the work thereof shall be done in
201c conformity with the building laws of the City, County and State; that no addition or alteration to or upon the said premises shall be made which will endanger the safety of the building, and the Lessor covenants and agrees upon demand at any time after the execution of this lease to properly execute or cause to be properly executed, and deliver to the Lessee all applications, consents and other instruments, which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing such alterations, changes, improvements and remodeling.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 530).

199d

The Lessor covenants and agrees that the demised premises will be delivered to the Lessee upon the commencement of the term of this lease in as good condition as the same now are, free from all tenancies and occupancies, and free from all orders and notices of violation of all public and quasi-public authorities, except as hereinafter specified.

That the Lessor may during the term at reasonable times enter to view the premises and may show the said premises and building to others, and at any time within three months next before 200d
expiration of the said term may affix to any suitable part of the said premises a notice for letting or selling the premises, or building, and keep the same affixed without hindrance or molestation.

The Lessor covenants and agrees as a condition precedent hereto and as a part of the consideration herefor, not to let, use or permit to be used any other portion of the building or buildings of which demised premises form a part for the sale, display or advertising of cigars, cigarettes, tobacco or smokers' articles, during the term hereof.

Provided always, that in case the building of which demised premises form a part shall be so 201d
damaged by fire or other casualty or happening as shall not substantially destroy the building, then the demised premises shall be restored to their condition immediately prior to such damage or destruction with due diligence by the Lessor, and a just proportion of the rent hereinbefore reserved, according to the extent of the injury or damage sustained by the demised premises, shall be suspended and abated until the demised premises shall have been so restored and put in proper condition for use and occupation.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199c

PROVIDED ALSO, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment
200c of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case
201c of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified.

All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the Lessor or to one of the executive officers of the Lessee or shall be sent by registered mail addressed to the party intended to be notified at its last known post office address and notice given as aforesaid shall be a sufficient service thereof.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

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In case the building herein demised shall be so damaged by fire or other casualty as to be substantially destroyed, then the demised premises shall be restored to their condition immediately prior to such destruction or damage with due diligence by the lessor, and a just proportion of the rent herein reserved, according to the extent of the injury or damage sustained by the demised premises, shall be suspended and abated until the demised premises shall have been so restored and put in proper condition for use and occupation; but in such case, if the amount realized from 200f
insurance carried on said premises as herein provided shall be insufficient to defray the expense of such restoration the lessee shall, at the time when said restored premises are ready for use and occupation, loan and advance to the lessor the amount which shall represent the excess of cost of such restoration over the amount of insurance so realized (not exceeding, however, in any event, a sum equal to one year's rental under the terms hereof at the rate payable at the time of such damage or destruction), which amount so loaned and advanced shall be repaid to the lessee by crediting the same upon monthly rental 201f
thereafter accruing hereunder until the aggregate amount of such installments of rent shall be equal to the amount so loaned and advanced; or, if the term of this lease shall come to an end before the rental so accruing shall equal the amount of such advance, then upon the expiration of said term the lessor shall repay to the lessee any balance of said advance remaining unsatisfied in the manner aforesaid.

In the event that the building hereby demised shall be condemned or declared by any authority

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199g having jurisdiction of the premises as unsafe, the demised premises shall be repaired and placed in proper condition by the lessor, and a just proportion of the rent herein reserved shall be suspended and abated until the demised premises shall have been put in safe and proper condition for use and occupation. In the event that by reason of such condemnation or other action on the part of any authority it shall become necessary to demolish and remove the said building, then and upon the happening of any such event 200g the lessor shall with due diligence erect a new building of substantially the same dimensions and of as good material and workmanship as the present building, and a just proportion of the rent reserved shall be suspended and abated from the time said original building is demolished until such new building shall be fully ready for occupancy.

The lessee covenants and agrees that in addition to the rental hereinbefore provided the lessee will, in the name of the lessor, pay all taxes and assessments of every character levied or assessed against the demised premises after the year 1919, which 201g shall be and become payable at any time during the term hereof, and including the taxes and assessments levied for the year 1944 and which shall become payable on or before the First day of May, 1945, and the lessee shall within thirty days after such payment deposit with the lessor duplicate receipts evidencing the same; but the lessee shall not be required hereunder to pay any taxes or assessments levied after the year 1944, or any installments of special assessments becoming due and payable after the First day of May, 1945, and nothing herein contained shall be

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construed to impose upon the lessee an obligation to pay income, estate, inheritance or transfer taxes of any character; provided, however, that in case at any time during the term of this lease taxes upon real estate or improvements thereon shall cease to be levied by the State of Illinois, or any taxing body or bodies therein, and in substitution for such taxes upon the real estate or improvements herein demised there shall be levied a tax upon the income derived by the lessor from the demised premises or any part thereof, then and in such case it is understood and agreed 200h that the lessee shall pay to the lessor, as so much additional rent hereunder, and within thirty days after the amount thereof can be accurately ascertained, and upon written notice from the lessor, any income tax that may be levied or assessed against the lessor by the State of Illinois or by any duly authorized taxing body within said State upon the income of the lessor derived under this lease; provided, however, that such income tax so to be derived by the lessee shall be computed at such rate as would be applicable if the lessor had no other income than that derived hereunder. The lessee also agrees to pay all water rates and 201h all gas and electric bills which shall be or become chargeable against said premises during the term of this lease.

Said lessee covenants and agrees to keep the said demised premises and the buildings and improvements thereon at all times free and clear from any and all liens, to pay all costs, expenses and liabilities arising out of or resulting from alterations or improvements of said premises made by the lessee, and to save the lessor harmless from all liability in connection therewith to persons

199*i*

by reason of any Workmen's Compensation Act or from claims arising out of the condition of the premises or adjoining walks during the term hereof. The lessee covenants to cause to be inserted in its contracts for alteration of the demised premises a clause waiving mechanic's and material men's liens, and it is agreed that lessee has no authority, express or implied, to create a lien upon or assign the interests of the lessor in said premises by judgment, assignment, mechanic's or material men's lien or otherwise.

200*i* The lessee further covenants and agrees that during the term of this lease the lessee will, at its own expense, keep the said building herein demised, and any and all buildings which may be substituted therefor, fully insured against loss by fire for their full insurable value in good responsible insurance companies, and that all policies evidencing such insurance shall by their terms provide for payment of the insurance in case of loss to the lessor, or to any mortgagee from the lessor as such mortgagee's interest may appear, and that such policies shall be deposited with the lessor from time to time as the same are issued,

201*i* and lessor shall be furnished with receipt showing payment of the premiums on said policies.

It is further agreed that the whole amount of the rent hereby agreed to be paid and each and every installment thereof and all taxes, assessments, water rates, special assessments and all other charges and impositions payable by the lessee as herein provided, and all costs, attorney's fees and expenses which may be incurred in enforcing the provisions of this lease and all sums of money required by the terms hereof to be paid by the lessee shall be and they are hereby de-

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

clared to be a valid and first lien upon all the 199j
interest of the lessee and its assigns in this lease and the property hereby demised.

Said lessee further covenants and agrees that no alterations shall be made to the building now on said premises or which may hereafter be substituted therefor which shall tend to diminish the value thereof without the consent in writing of said lessor.

Said lessee further covenants, promises and agrees that the buildings and improvements upon the said demised premises, and all the sidewalks, 200j
steps, areas and excavations in, upon, around, about or adjacent to said premises, shall be kept by said lessee in a good, safe, secure, clean and sanitary condition and conformable to the requirements of the State of Illinois, the City of Waukegan and all public authorities, and that said lessor shall be kept free, harmless and indemnified at all times against any and all loss, damage, reasonable costs, expenses and attorney's fees, by reason of a failure so to do, in any respect or by reason of any accident, loss or damage resulting to any person or property by reason of any use which may be made of said premises 201j
or property, or by reason of any act or thing done or omitted to be done upon or about the said premises.

Said lessee further covenants and agrees that it will keep harmless and indemnify said lessor and the said demised premises from all damages, claims, penalties and reasonable costs and expenses whatsoever that may result to the lessor or to said premises or to any improvements at any time situate thereon under the provisions of any present or future statute, ordinance or law

199k for any violation or breach occasioned by the act or neglect of the lessee upon or about the said premises at any time during the term of this lease; and said lessee also promises that it will defend and keep harmless and indemnify the lessor from all damages and penalties arising out of any alleged breach or default by the lessee in the performance of any provision of this lease or any requirement of law arising out of any accident, wrong, injury or occurrence upon or about the said premises.

200k The lessee covenants that it will not assign this lease without in each case the written consent of the lessor had and will not permit any transfer by operation of law of the interest in the said premises acquired through this lease; and it is further expressly hereby covenanted and agreed between the lessor and the lessee that no sale or assignment of the lease on the lessee's part shall relieve the lessee from its obligation to pay rent or from any other covenant or obligation in this lease contained. The lessee shall, however, have the right to sublet any part of said premises, subject to the terms and provisions of this lease; pro-

201k vided, always that said lessee shall remain liable for the payment of all the rent herein reserved and the performance of all the covenants and agreements of this lease.

It is further covenanted and agreed that none of the covenants, terms and conditions of this lease to be kept and performed by the lessee shall in any manner be altered, waived, modified, changed or abandoned, except by a written instrument duly signed and delivered by the lessor or by his agent thereunto duly authorized, and not otherwise.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

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The lessee accepts the herein demised premises subject to the leases now outstanding, which said leases lessor hereby assigns to lessee, and the lessee accepts said leases together with the burden thereof; which outstanding leases are the following:

Ground floor store Northeast Corner of Genesee and Washington Streets—Lease to United Cigar Stores Company (Illinois Corporation) expiring April 30, 1922; monthly rental $175.00;

North ground floor store on Genesee Street and second floor above Burton store—Lease to Security Title & Trust Company expiring May 1, 1922; rental $125.00 per month; 2001

Ground floor store-room Number 134 Washington Street—Lease to Andrew J. Burton expiring April 30, 1922; rental $75.00 per month;

Rooms 203 and 204 second floor—Lease to Morris J. Kalowsky expiring April 30, 1922; rental $35.00 per month;

Rooms 205, 206 and 207 second floor—Lease to R. K. Davis expiring April 30, 1922; rental $35.00 per month; 2011

Rooms 208 and 209 second floor—Lease to Will C. Parker expiring April 30, 1922; rental $20.00 per month;

Rooms 301 and 302 third floor—Lease to Mary H. Love expiring May 1, 1922; rental $16.00 per month;

Three rooms consisting of Southwest corner room with bay window and the two nearest adjoining rooms, one connecting with the corner bay window room from the east side of said corner bay window room, and one

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199m

room connecting with the said bay window room from the North side of said bay window room, all situated on the third floor of the building—Lease to Wm. A. Dean and Walter A. Taylor, expiring May 1, 1922; rental $30.00 per month.

The front portion of the basement under the store occupied by the Shoe Shining Parlor and the United Cigar Stores Company—Lease to Chappe Tyrrell, expiring April 30, 1921; rental $15.00 per month.

200m One room on third floor now occupied by C. W. Webster, year to year tenancy in C. W. Webster, arising out of hold-over under lease expiring April 30, 1917; rental $10.00 per month.

Room on third floor now occupied by Mandy & Stein, year to year tenancy in Mandy & Stein, arising out of hold-over under lease expiring April 30, 1918; rental $10.00 per month. Occupied for Music Conservatory.

Room on third floor now occupied by Alex Meyers for manufacture of cigars, month to
201m month tenancy in Alex Meyers; rental $10.00 per month.

Two rooms on Third floor now occupied by Liberty Oil Company, month to month tenancy in Liberty Oil Company; rental $20.00 per month.

And the said Lessor doth covenant that the said Lessee on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

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And it is further understood and agreed that the covenants and agreements contained in the foregoing lease are binding upon the parties hereto and their respective heirs, administrators, successors, legal representatives and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and affixed their respective seals the day and year first above written.

SAMUEL SCHWARTZ
(Seal)

200n

UNITED CIGAR STORES COMPANY
OF AMERICA
By D E BLOCK
Vice Prest.
(Seal)

In the Presence of:

C. B. KINLEY
JACOB SCHWARTZ

201n

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5304).

199o

State of Illinois,
County of Cook—ss.:

On this 20th day of April, 1920, before me personally came Samuel Schwartz to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALFRED G. JOHNSON,
Notary Public.

200o

State of Illinois,
County of Cook—ss.:

On this 20th day of April, in the year nineteen hundred and twenty, before me personally came D. E. Block to me known, who being by me duly sworn, did depose and say that he resided in Chicago, Illinois; that he is the Vice President of the United Cigar Stores Company of America the corporation described in, and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said in-
201o strument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

ALFRED G. JOHNSON,
Notary Public.

199p

Trustee's Objection to Claim of Abe Schwartz, et al.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation No. 59,886.

200p

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

PLEASE TAKE NOTICE that upon the annexed petition of Irving Trust Company, Trustee of the estate of the above-named Debtor, verified March 7, 1935, a hearing will be held before Hon. Irwin Kurtz, Special Master, at 15 Park Row, Borough of Manhattan, City of New York, N. Y., on March 29, 1935, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and that at said hearing the undersigned will move this Court to have the claim referred to in said petition expunged and barred from participation

201p

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in any plan of reorganization confirmed by the Court in these proceedings.

Dated, New York, N. Y., March 7, 1935.

Yours, etc.,

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys and Solicitors for Irving Trust Company, Trustee of the estate of United Cigar Stores Company of America, Debtor,

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Office and Post Office Address:
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

To:

BENJAMIN I. MORRIS
and
SOLOMON E. HARRISON,
134 N. LaSalle Street, Chicago, Illinois,
and
GILBERT, DIAMOND & BRANDEIS,

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745 Fifth Avenue, New York, N. Y.
Attorneys for Claimant(s).

ROSENBERG, GOLDMARK & COLIN,
165 Broadway, New York, N. Y.
Attorneys for Debtor.

M. CARL LEVINE,
535 Fifth Avenue, New York, N. Y.
Attorney for Jacob Ruppert Realty Corporation.

Trustee's Objection to Claim of Abe Schwartz, et al.

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MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place, New York, N. Y.,
and
RALPH MONTGOMERY ARKUSH,
15 Broad Street, New York, N. Y.
Attorneys for Landlords' Protective Committee.

SHEARMAN & STERLING,
55 Wall Street, New York, N. Y.,
and
BERLE & BERLE,
70 Pine Street, New York, N. Y.
Attorneys for Preferred Stockholders' Protective Committee.

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DAVIS, POLK, WARDWELL, GARDINER & REED,
15 Broad Street, New York, N. Y.
Attorneys for Debentureholders Protective Committee.

SULLIVAN & CROMWELL,
48 Wall Street, New York, N. Y.
Attorneys for United Stores Corporation.

SMYTH, TUTTLE & ARPAIA,
40 Wall Street, New York, N. Y.
Attorneys for Irving Trust Company, Trustee in Bankruptcy for Cigar Store Realty Holdings, Inc.

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Trustee's Objection to Claim of Abe Schwartz, et al.

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DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

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To the Honorable Irwin Kurtz, Special Master:

The petition of Irving Trust Company, as Trustee of the estate of the above-named Debtor, respectfully shows to the Court as follows:

On June 14, 1934, your petitioner was appointed temporarily and qualified as Trustee of the estate of the above-named Debtor, and on July 17, 1934, the appointment of your petitioner as Trustee was made permanent.

There has been filed with this Court a proof of
210 claim numbered 5304 by Abe Schwartz and Myrtle Schwartz, his wife (hereinafter called the Claimant), setting forth an alleged claim of the claimant against the Debtor in the sum of $62,626.08. with int. Your petitioner objects to the allowance of said claim for the following reasons:

The Trustee objects to the allowance of this claim in whole or in part for the reason that the lease upon which the claim is based was never rejected by the Trustee in Bankruptcy. Moreover, by agreement dated November 14,

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1932, the Trustee and the Debtor assigned to the claimants their respective right, title, and interest in and to said lease, and by said agreement the claimants assumed all existing and future obligations required under said lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder.

Your petitioner, accordingly, desires to have its objections to said claim heard and considered, and said claim expunged and barred from participation 212
in any plan of reorganization confirmed by the Court in these proceedings.

This petition and all proceedings had thereon are not intended to affect in any way, or to waive any rights of your petitioner in regard to, the questions reserved by the Court for further determination as provided in its order of July 17, 1934 as amended, and, except as specifically stated in the foregoing objections, your petitioner reserves its right of objection, as provided by order of this Court dated November 13, 1934, with respect to all questions relating to the scrutiny of the circumstances of an assignment of future rent claims 213
and the amount of the consideration paid for such assignment in determining the amount of damages to be allowed the assignee thereof, and the limitation of claims filed by committee members or agents to the actual consideration paid therefor.

WHEREFORE, your petitioner respectfully requests that a time be fixed by this Court for hearing your petitioner's objections to said claim of which due notice to the Claimant and to all persons and parties who have intervened in these

proceedings, or to their attorneys, shall be given by mail.

Dated, March 7, 1935.

IRVING TRUST COMPANY,
as Trustee of the estate of United Cigar Stores Company of America, Debtor,
By JOSEPH T. STEARNS,
Assistant Secretary.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys and Solicitors for said Trustee,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

United States of America,
Southern District of New York,
State of New York,
County of New York—ss.:

JOSEPH T. STEARNS, being duly sworn, deposes and says that he is an Assistant Secretary of Irving Trust Company, the petitioner herein, and that he has read the foregoing petition and knows the contents thereof, and is informed and verily believes that the same is true.

JOSEPH T. STEARNS.

Subscribed and sworn to before me this 7th day of March, 1935.

ANNE L. RANDBY,
Notary Public,
Kings County.
Kings Co. Clk's No. 482, Reg. No. 5157.
N. Y. Co. Clk's No. 315, Reg. No. 5 R 175
Ctf filed N. Y. Co.
Commission expires March 30, 1935.

(Usual Affidavit of Service by Mail.)

Trustee's Exhibit 1, April 2, 1935.

(Marked in evidence at folio 827.)

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ASSIGNMENT AGREEMENT

GRF:EM #1236

ASSIGNMENT AGREEMENT, made this 14th day of November, 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, ABE SCHWARTZ AND MYRTLE SCHWARTZ, HIS WIFE, of 28 N. Genesee Street, Waukegan, Illinois, (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

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1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated April 20, 1920 (hereinafter called the Lease), covering certain premises located at Northeast corner of Washington and Genesee Streets, in the City of Waukegan, Illinois, being the entire three story and basement building, (hereinafter called the Premises), for a term commencing May 1, 1920 and expiring April 30, 1945.

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2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court

220 for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 11, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right,
221 title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to ABE SCHWARTZ AND MYRTLE SCHWARTZ, HIS WIFE
222 any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

SECOND: The Bankrupt hereby assigns to ABE SCHWARTZ AND MYRTLE SCHWARTZ, HIS WIFE any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

Trustee's Exhibit 1, April 2, 1935.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord. 223 224

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee. 225

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part

226 of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any
227 and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

RIDER

Nothing in this ARTICLE 5 shall be deemed a waiver by the Landlord of the right to prove
228 against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance.

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this

Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of the United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise. 229

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written. 230

IRVING TRUST COMPANY as Trustee
in Bankruptcy for United Cigar
Stores Company of America,
By JOSEPH T. STEARNS,
Assistant Secretary.

ABE SCHWARTZ,
Landlord.

MYRTLE SCHWARTZ,
Landlord. 231

UNITED CIGAR STORES COMPANY
OF AMERICA,
By GEO. J. WISE,
Vice President.

Trustee's Exhibit 1, April 2, 1935.

232 SCHEDULE OF SUBLEASES:

Tenant—Christ Poulos, Nick Poulos and Peter Stylianos. Premises—Store #1, 136 Washington St. Lease Expiration—December 31, 1934.

Tenant—Lee Shops, Inc. Premises—Entire 2nd floor and display window on ground floor. Lease Expiration—November 30, 1934.

Tenant—Harold N. Tennyson. Premises—Basement. Lease Expiration—September 30, 1934.

(Acknowledgments.)

233 Acknowledgment of Geo. J. Wise as Vice-President of United Cigar Stores Company of America on December 9, 1932, before Ann L. Reilly, Notary Public, New York County.

Acknowledgment of Joseph T. Stearns, one of the Assistant Secretaries of Irving Trust Company as Trustee in Bankruptcy on December 9, 1932, before Alma Berger, Notary Public, Queens Co.

Acknowledgment of Abe Schwartz and Myrtle Schwartz, his wife, on November 15th, 1932, before Viola Dupies, Notary Public, Illinois.

234 (Seal)

Trustee's Exhibit 2(3), April 2, 1935.

(Marked in evidence at folio 827.)

235

Dec. 17, 1932

Lease No. 1236

Abe Schwartz and Myrtle Schwartz,
28 N. Genesee St.,
Waukegan, Ill.

Dear Sir & Madam:

Re: Premises N. E. C. Washington & Genesee Sts.
Waukegan, Ill.

We enclose herewith the following executed documents covering the above premises:

Assignment agreement dated Nov 14th, 1932 between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Abe Schwartz and Myrtle Schwartz, his wife, and United Cigar Stores Company of America. 236

Lease dated Apr. 20th, 1920 between United Cigar Stores Company of America, Lessee and Samuel Schwartz, lessor.

Sublease dated Dec. 1st, 1931 to Lee Shops, Inc.

Sublease dated Sept. 8th, 1924 to Christ Poulos, Nick Poulos and Peter Stylianos.

Sublease dated Oct. 5th, 1931 to Harold N. Tennyson. 237

Kindly acknowledge receipt.

Yours very truly,

IRVING TRUST COMPANY,
as Trustee in Bankruptcy,
By E. PAUL PHILLIPS

Encl.
REG.
CWD:ER

Registered Return Receipt attached to original.

Statement of Contents of Proof of Claim of William E. Munk, et al. (No. 5277).

238 The following is a statement of proof of claim of William E. Munk and Warren H. Munk, filed in the within proceeding.

The claimants are the owners of a claim against the debtor based upon or arising out of the lease dated May 10, 1922, between Herman Munk and the debtor for a term commencing prior to August 29, 1932 and ending on June 30, 1947, or for injury resulting from the rejection of said lease by the trustee in bankruptcy on or about November 16, 1932, or for damages or indemnity under a covenant or covenants contained in said lease.

239 The trustee in bankruptcy surrendered the premises covered by said lease on November 18, 1932, and the landlord re-entered said premises on or about December 1, 1932. Except as shown in the within claim, neither the debtor nor the trustee in bankruptcy has paid the rent or other obligations accruing under said lease after August 31, 1932.

The claimants are owners of the claim by reason of being the sole heirs at law of the original lessor, Herman Munk.

The claimants compute the amount owing to them on the date of the approval of the petition

240 for reorganization as follows:

> The total lease obligations which have not been paid by the debtor is $211,144.03. This sum is made up of the total net or fixed rent for the entire term not paid by the debtor ($148,333.34), plus taxes, insurance and other payments required to be made by the debtor for the entire term not made by debtor ($63,810.69). There is deducted from this said total lease obligation the sum of $122,940.32, consisting of the fair rental value of the leased premises from the date of rejec-

241

tion of the lease to the end of the term ($122,332), plus the amount paid by the trustee in bankruptcy for use and occupation of the premises by said trustee ($608.32). The total amount claimed for the entire term of the original lease is, therefore, $88,203.71.

The total amount of the claim allowable under Section 77B on a parity with debts which would be provable under Section 63 (a) is $46,707.33. This is made up by adding the unpaid lease obligations accrued up to the date of surrender or re-entry, whichever first occurred ($4,608.93) to 242
the total lease obligations for three year period or for the entire balance of the term, if less than three years ($42,098.40).

The above said unpaid lease obligation ($4,608.93) is made up by deducting from the total lease obligations accrued up to the date of surrender of premises or date of re-entry by landlord, whichever first occurred, and not paid by debtor ($5,065.17), the amount paid by trustee in bankruptcy for use and occupation of premises by said trustee ($456.24). The above said figure of $5,065.17 is made up by adding the net rent accrued up to the date of surrender or re-entry 243
($2500), plus taxes, assessments and other payments to be made up to date of surrender or re-entry ($2,565.17).

The above said figure of $42,098.40 for total lease obligations for three year period is made up by adding the net or fixed rent reserved in the lease, without acceleration, for three years next succeeding the date of surrender or re-entry, whichever first occurred ($30,000), to the taxes, assessments and other payments to be made over the said three year period ($12,098.40).

Statement of Trustee's Objection to Claim of William E. Munk et al. (No. 5277).

244 Paragraph V is the same as Paragraph V of the proof of claim printed in Claim No. 5304 (p. 64).

No part of the claim has been paid; there are no set-offs or counterclaims thereto; the claimant has not received any security for said debt; no judgment has been rendered therefor; a claim based on said lease was filed in said bankruptcy proceeding and was not allowed.

The proof of claim is executed by both claimants before a notary public on September 29, 1934.

245 A power of attorney is given to Benjamin I. Morris and Solomon E. Harrison.

Attached to the proof of claim is the original lease between claimant and debtor substantially in the form of the lease printed in Claim No. 5304 on pages 67 to 67*o*, including a similar forfeiture clause.

Statement of Trustee's Objection to Claim of William E. Munk et al. (No. 5277).

The following is a statement of the objection
246 filed by the Trustee of the Debtor's estate to the claim of William E. Munk et al. (No. 5277) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5277 by William E. Munk and Warren H. Munk (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $88,203.71 with

interest. Your petitioner objects to the allowance 247
of said claim for the following reasons:

The Trustee objects to the allowance of this claim in whole or in part for the reason that by agreement dated November 29, 1932, the Debtor assigned to the claimants all of its right, title and interest in and to the lease upon which the claim is based, thereby effecting a surrender of said lease and terminating all obligations of the Debtor thereunder.

Trustee's Exhibit 3, April 2, 1935.

(Marked in evidence at folio 867.) 248

ASSIGNMENT AGREEMENT

GRF:AB S.2072

ASSIGNMENT AGREEMENT, made this 29th day of November, 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of United Cigar Stores Company of America, (hereinafter sometimes called the Trustee), party of the first part, WILLIAM E. MUNK and WARREN H. MUNK, of 1902 N. Pennsylvania Street, Indianapolis, Indiana (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY 249
OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated May 10, 1922 (hereinafter called the Lease), covering certain premises Lots 3 and 4 in Seitz's Addition to the City of Muncie, Delaware County, State of Indiana. Said demised premises being the land

250 and building situated at the Northwest corner of Walnut and Charles Street in said City of Muncie, and having a frontage on Walnut Street of about 60′ and on Charles Street of about 125′.

(hereinafter called the Premises), for a term commencing July 1, 1927 and expiring June 30, 1947.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court
251 for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 18, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and
252 all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease. Pursuant to said order the Trustee rejected the Lease on November 21, 1932, the Landlord not having theretofore requested such assignment.

5. The Landlord now desires to obtain an assignment of the Lease and agreements of sublease from the Bankrupt and to agree with the Bankrupt and Trustee with respect to the matters hereinafter set forth.

NOW, THEREFORE, in consideration of the prem-

ises, the assignment herein made and the mutual covenants and agreements herein contained, the 253
parties hereto agree as follows:

FIRST. The Bankrupt hereby assigns to William H. Munk and Warren H. Munk any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue, from and after September 1, 1932, under said agreements of sublease.

SECOND. The Trustee agrees to pay to the Land- 254
lord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932, less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Re- 255
ceiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

THIRD. The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt.

Trustee's Exhibit 3, April 2, 1935.

256 FOURTH. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the
257 Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise
258 out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store);

RIDER IS ATTACHED HEREAT.

provided, however, that nothing in this or the preceding paragraph contained shall impose upon the landlord any liability on account of any matter or thing relating to the subleases, a schedule of which is hereinafter set forth, arising prior to the delivery of this instrument, the liability

of the landlord with reference to said subleases being limited to matters thereafter arising. 259

Nothing in this paragraph or the preceding one shall be deemed a waiver by the landlord of the right to prove claims against the bankrupt estate on any provable claim to which the bankrupt court may adjudge the landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such, or relieve the landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the trustee from contesting such proof or allowance. 260

(Initials of parties affixed to rider hereat.)

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY
As Trustee in Bankruptcy for United
Cigar Stores Company of America
By JOSEPH T. STEARNS
Assistant Secretary

261

WILLIAM E. MUNK
WARREN H. MUNK
Landlord

UNITED CIGAR STORES COMPANY
OF AMERICA
By H. G. WOLFF
Vice President

Witnesses
(signature illegible)
(signature illegible)

Trustee's Exhibit 3, April 2, 1935.

262 SCHEDULE OF SUBLEASES.

Tenant—Clarence Alfred Powers. Premises—Store #1. Expiration Date—June 30, 1933.

Tenant—Buehler Brothers, Inc. Premises—Store #4. Expiration Date—June 30, 1933.

Tenant—R-W Realty Company, Inc. Premises—Store #5. Expiration Date—August 31, 1933.

Tenant—Charles K. Darge. Premises—Store #7. Expiration Date—February 28, 1933.

Tenant—Samuel L. Cunnington. Premises—Store #8. Expirate Date—October 31, 1932.

Tenant—Charles R. Dollar. Premises—Portion
263 of second floor. Expiration Date—June 30, 1933.

Tenant—Addie Kleysteuber. Premises—Rooms. Expiration Date—December 31, 1932.

(Acknowledgments.)

Acknowledgment of H. G. Wolff as Vice-President of United Cigar Stores Company of America, on December 6th, 1932, before William H. Weiss, Notary Public, Illinois.

Acknowledgment of Joseph T. Stearns, as Assistant Secretary of the Irving Trust Company Trustee in Bankruptcy of United Cigar Stores
264 Company of America on December 13, 1932, before Alma Berger, Notary Public, Queens County.

Acknowledgment of William E. Munk and Warren H. Munk, on December 3, 1932, before Mary G. Robinns, Notary Public, Indiana.

Trustee's Exhibit 4, April 2, 1935.

(Marked in evidence at folio 867.)

265

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys at Law
1100 Hume-Mansur Building
Indianapolis, Indiana

November 9, 1932

Irving Trust Company,
Trustee in Bankruptcy of
United Cigar Stores Company
of America,
625 Madison Avenue,
New York, N. Y.

Gentlemen:—

266

Messrs. Warren H. Munk and William E. Munk, who are the sole heirs at law of Herman Munk who died intestate in September, 1931, have received your communication of recent date enclosing a notice of the order of the court in the matter of the abandonment of certain leases made by the United Cigar Stores of America and including lease numbered 2072 made by Herman Munk and wife.

Messrs. Munk, as the owners of this property, desire to take over all interest in the lease and in and to the sub-leases in accordance with your letter, and have executed the formal request therefor which was contained with your communication, which we are enclosing herewith.

267

Will you kindly advise us when and what settlement may be expected on account of the rental for the premises since the institution of the bankruptcy proceedings?

Yours very truly,

SMITH, REMSTER, HORNBROOK
& SMITH

HHH:JH

Trustee's Exhibit 5, April 2, 1935.

(Marked in evidence at folio 867.)

268

NOTICE TO LANDLORDS

Any Landlord wishing to secure an assignment of all right, title and interest in and to the lease described in the enclosed Order to Show Cause and the subleases thereunder of Irving Trust Company as Trustee in Bankruptcy of United Cigar Stores Company of America and of the Bankrupt, pursuant to subdivision (c) of the Order, should promptly fill out and mail the following application:

Irving Trust Company,
269 Trustee in Bankruptcy
of United Cigar Stores
Company of America,
625 Madison Avenue,
New York, N. Y.

Indianapolis, Indiana
November 9th, 1932

Dear Sirs:—

The undersigned, as Landlord under Lease No. 2072 covering the premises located at Northwest corner, Walnut & Charles Streets, Muncie, Indiana, hereby requests an assignment of all right,
270 title and interest in and to said lease and in and to the subleases thereunder of Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores of America and the Bankrupt.

Yours truly,

WARREN H. MUNK (signed)
WILLIAM E. MUNK (signed)

Trustee's Exhibit 6, April 2, 1935.

(Marked in evidence at folio 867.) 271

LV:ACK November 19th, 1932.

Smith, Remster, Hornbrook & Smith,
1100 Hume-Mansur Building,
Indianapolis, Indiana.

Gentlemen:—

Re: Lease 2072—N. E. Cor. Walnut and Charles Streets, Muncie, Indiana.

As per your request, we are enclosing herewith assignment agreement in triplicate, covering the above entitled premises, which we would thank you to kindly have your clients sign, acknowledge 272 and return to this office for completion.

As soon as these documents are completely executed, a copy will be sent to you for your client's files.

Yours very truly,

IRVING TRUST COMPANY, as
Trustee in Bankruptcy of United
Cigar Stores Company of America
By E. PAUL PHILLIPS

Enc.

Trustee's Exhibit 7, April 2, 1935. 273

(Marked in evidence at folio 867.)

November 23, 1932 No. 452

Smith, Remster, Hornbrook & Smith, Esqs.,
1100 Hume Mansur Bldg.,
Indianapolis, Ind.

Re: L-2072
325 S. Walnut St., Muncie, Indiana

Dear Sirs:—

The undersigned Trustee in Bankruptcy of United Cigar Stores Company of America, Bank-

274 rupt, recently notified the lessors of its election to reject all right, title and interest in and to the lease of the above premises to the Bankrupt. The Trustee wishes to call your attention to the fact that its rejection of this lease does not eliminate the interest of the Bankrupt in either this lease or any subleases thereunder and consequently does not clear your title to the premises or establish your right to any subleases which may have been made by the Bankrupt. There also remains to be settled the matter of the Trustee's accounting to the lessor for the bankruptcy period prior
275 to its election to reject the lease, i.e., for the reasonable value of the use and occupation of any part of the premises occupied by the Trustee or Receiver in Bankruptcy and for any sub-rents, less expenses, collected by the Trustee or Receiver.

In view of the great number of these situations involved, and the importance to the Trustee in administering the estate under orders of the Bankruptcy Court as well as the importance to the landlords under such leases, of disposing of these matters without the delay of court action, the Trustee suggests the following arrangement for
276 your consideration:

1: An assignment to the Lessor or his nominee, of all right, title and interest of the Trustee and of the Bankrupt in the original lease. This assignment clears your title to the property and eliminates the necessity of your taking any steps to terminate the Bankrupt's lease which would also terminate any existing subleases and release the subtenants.

2: An assignment to the Lessor or his nominee, of all right, title and interest of the

Trustee and of the Bankrupt in any sub- 277
leases of portions of the premises and an assumption of such subleases by the Lessor.

Trustee's Exhibit 8, April 2, 1935.

(Marked in evidence at folio 867.)

Smith, Remster, Hornbrook & Smith, Esqs.

3: An assignment to the Lessor or his nominee, of all claims against subtenants for rents due for the period subsequent to September 1st.

4: An agreement by the Trustee to ac- 278
count to the Lessor for all rents in respect of the period subsequent to September 1, 1932 collected from subtenants by the Trustee or the Receiver, deducting from such rents only the expenses of collection, if any, and such expenses as the Trustee or Receiver may have incurred in the operation of the sublet portions of the premises subsequent to the Bankruptcy.

5: Payment by the Trustee for the use and occupation of that portion of the premises occupied by it or the Receiver as a cigar 279
store, of a sum equivalent to 5% of the gross sales of the business conducted in the cigar store by the Trustee or Receiver subsequent to the bankruptcy.

6: A general release of the Trustee and Receiver, the Bankrupt and the Bankrupt Estate.

Many landlords have decided that it was to their advantage finally to close the entire matter by entering into such an arrangement. We suggest that you give the arrangement your consid-

280 eration, and if you decide that you wish to take such an assignment and settle the Trustee's obligation on the above basis, please advise us by signing and forwarding the enclosed form. The agreement will then be prepared in this office and forwarded to you for your approval and execution if satisfactory to you.

Yours very truly,

IRVING TRUST COMPANY, as
Trustee in Bankruptcy of United
Cigar Stores Company of America,
By E. PAUL PHILLIPS

281

Trustee's Exhibit 9, April 2, 1935.

(Marked in evidence at folio 867.)

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys at Law
1100 Hume-Mansur Building
Indianapolis, Indiana

November 25, 1932

Irving Trust Company,
Trustee in Bankruptcy of
United Cigar Stores Company of America,
282 625 Madison Avenue,
New York, N. Y.

In Re: Lease 2072—N.E. Cor. Walnut and Charles Streets, Muncie, Indiana.

Gentlemen:

This will acknowledge receipt of your favor of the 19th inst. enclosing assignment agreement in triplicate, covering the sub-leases on the above described premises.

All three copies have been executed by Messrs.

Trustee's Exhibit 10, April 2, 1935.

Warren H. Munk and William E. Munk, and I 283
am returning the same to you herewith.

Will you kindly return an executed copy as promptly as possible, and at the same time send us the original sub-leases which are assigned under the provisions of this agreement? And also furnish us with a statement of the receipts of the Trustee in Bankruptcy from these sub-leases during the period of the bankruptcy.

Very truly yours,

H. H. HORNBROOK (signed)

HHH:MR

284

Trustee's Exhibit 10, April 2, 1935.

(Marked in evidence at folio 867.)

SMITH, REMSTER, HORNBROOK & SMITH
Attorneys at Law
1100 Hume-Mansur Building
Indianapolis, Indiana

R 999

November 28, 1932.

Irving Trust Company,
Trustee in Bankruptcy of
United Cigar Stores Company
of America, 285
625 Madison Avenue,
New York, N. Y.
In Re: L-2072

325 S. Walnut St., Muncie, Indiana

Gentlemen:—

We are in receipt of your favor of the 23rd inst. concerning suggestions for the method of closing up the outstanding situations affecting this lease, and therein enclosing paper to be signed by the owners of the fee.

286 This has been signed by Messrs. Warren H. Munk and William E. Munk, and we are enclosing to you herewith. However, we wish to call your attention to the fact that a number of these same matters were covered in the agreement relating to the assignment of the subleases which we forwarded to you with our letter of November 25th.

Of course, before the owners can determine whether they will assume the obligations of the lessor under the various sub-leases, they will need to be furnished with copies of the sub-leases.

Very truly yours,

287 SMITH, REMSTER, HORNBROOK & Smith

HHH:M

Trustee's Exhibit 11, April 2, 1935.

(Marked in evidence at folio 867.)

November 28, 1932

Irving Trust Company,
Trustee in Bankruptcy of United
Cigar Stores Company of America,
625 Madison Avenue,
New York, N. Y.

288 Lease No. 2072

Dear Sirs:

Referring to your letter of November 23rd, 1932 relating to the lease of the premises located at Walnut and Charles Streets, Muncie, Indiana, please prepare, and submit for our consideration, a form of agreement as outlined in your letter, providing for an assignment of the lease and subleases, an accounting by the Trustee for rents received from subtenants and the payment by the Trustee for use and occupation of the cigar store premises on the basis of 5% of the gross sales.

Trustee's Exhibit 12, April 2, 1935.

Upon receipt of the agreement, we will advise you promptly whether we wish to sign it. 289

Yours very truly,

WARREN H. MUNK (signed)
WILLIAM E. MUNK (signed)

Trustee's Exhibit 12, April 2, 1935.

(Marked in evidence at folio 867.)

December 17th, 1932

CWDjg
William E. Munk and Warren H. Munk,
1902 N. Pennsylvania St., 290
Indianapolis, Ind.

Dear Sirs:

Re: Store No. 2072

We are enclosing herewith executed copy of Assignment Agreement dated November 29, 1932 made between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, William E. Munk and Warren H. Munk, and United Cigar Stores Company of America, covering premises at the Northwest corner of Walnut and Charles Street, Muncie, Indiana.

291

We are also enclosing herewith the following lease and sub-leases:—

Lease dated May 10, 1922 made between Herman Munk (his wife Ada H. Munk joining herein for the purpose of giving her consent hereto) and United Cigar Stores Company of America.

Sublease dated June 8, 1932 made to Clarence Alfred Powers.

Sublease dated April 14, 1927 made to Buehler Brothers, Inc.

Trustee's Exhibit 12, April 2, 1935.

292 Sublease dated August 9, 1927 made to the R-W Realty, Inc., together with agreement dated August 12, 1932.

Sublease dated February 13, 1928 made to Charles K. Dargo.

Sublease dated September 29, 1926 made to Charles R. Dollar.

Sublease dated January 3, 1931 made to Addie Kleysteuber, together with three agreements under date of January 3, 1931.

Sublease dated April 6th, 1929 made to Samuel L. Cunnington, together with letter under
293 date of July 30, 1932.

Kindly acknowledge receipt.

Very truly yours,

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America,

By E. PAUL PHILLIPS

Registered Mail
Encl.
Registered Return Receipt attached to original.

294

Trustee's Exhibit 13, April 2, 1935.

(Marked in evidence at folio 867.)

Register No. 1443 295

WARREN H. MUNK AND WILLIAM E. MUNK
1902 N. Pennsylvania St.
corner 19th St.

Indianapolis, Indiana
Dec. 19th, 1932

Irving Trust Company, Trustee in
Bankruptcy for United Cigar Stores Company
of America,
625 Madison Avenue,
New York, N. Y.

Gentlemen: 296

Re: Store No. 2072

We received your letter of December 17th, 1932, with enclosures as stated.

Yours truly,

WARREN H. MUNK AND WILLIAM
E. MUNK
by WILLIAM E. MUNK (Signed)

Claimant's Exhibit A, April 2, 1935 (Claim No. 5277).

(Marked in evidence at folio 876.) 297

Oct. 1st, 1932.

Mr. G. Schmetzer,
189 N. Clark Street,
Chicago, Ill.

Dear Sir:

We are not willing to accept a minimum rental of $100.00 per month for the store room in the building belonging to us and now occupied by the United Cigar Stores at Muncie, Indiana.

After going over the matter carefully we are willing to enter into a lease for three years at a

298 rental of 6% of the monthly sales and with a minimum of $125.00 per month. In addition to this the tenant must pay the actual cost of heat furnished.

From such investigation as we have made we are convinced that the above figures are less than we could obtain from others but we do not desire to deal elsewhere so long as your people are interested.

Yours truly,

299 WARREN H. MUNK and
WILLIAM E. MUNK.
By WHM

Statement of Contents of Proof of Claim of Simon Lorch (Claim No. 5286).

The following is a statement of the contents of the proof of claim of Simon Lorch, filed in the within reorganization proceedings.

The claimant is the owner of a claim based upon or arising out of the lease dated December 20, 1928, between the claimant and the debtor for a
300 term commencing prior to August 29, 1932 and ending on April 30, 1960, or for injury resulting from the rejection of said lease by the trustee in bankruptcy on or about August 31, 1932, or for damages or indemnity under a covenant or covenants under said lease. The trustee in bankruptcy surrendered the premises on or about August 31, 1932, and the landlord re-entered the premises on or about August 31, 1932. Except as shown in the proof of claim, neither the debtor nor the trustee in bankruptcy paid the rent or other obligations accruing under the lease after August 31, 1932.

Statement of Contents of Proof of Claim of Simon Lorch (Claim No. 5286).

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The claimant computes the amount owing to him on the date of the approval of the petition for reorganization as follows:

> The total lease obligations which have not been paid by the debtor amount to $969,393.27 and consist of the fixed rent for the entire term ($760,833.32), plus taxes, insurance, assessments, water rents and other payments over the entire term ($208,559.95). There is deducted from this total lease obligations the sum of $728,199.37, which consists of the fair rental value of the leased premises from 302
> the date of the rejection of the lease to the end of the term ($723,796.24), plus the dividend paid in the bankruptcy proceeding on a claim based on the original lease ($4,403.13). The total amount claimed for the entire term of the original lease is, therefore, $241,193.90.

The total amount of the claim allowable under Section 77B on a parity with debts which would be provable under Section 63 (a) amounts to $107,941.99. This sum is made up of the unpaid lease obligations accrued up to the date of surrender or re-entry, whichever first occurred, 303
amounting to $8,025.87, plus the total lease obligations for three year period, or for the balance of the term, if less than three years, amounting to $99,916.12. The unpaid lease obligations to the date of surrender or re-entry ($8,025.87) consists of taxes, assessments, insurance, water rents and other payments up to the date of surrender or re-entry, not paid by the debtor ($12,429); less dividends paid in bankruptcy proceeding on any claim based on original lease ($4,403.13). The total lease obligations for three year period ($99,-

304 916.12) consist of the fixed rent reserved in the lease without acceleration, for three years next succeeding the date of surrender or re-entry, or for the balance of the term, if less than three years ($82,500), plus taxes, assessments, insurance, water rents or rates, or other payments over the three year period, not paid by debtor ($17,416.12).

Paragraph V is the same as Paragraph V printed in Claim No. 5304 (p. 64).

No part of the claim has been paid.

The claimant has not received any security for
305 the said debt, except that the debtor and the Fidelity and Casualty Company of New York executed a surety bond in the penal sum of $3,757.08 to indemnify claimant as to the general real estate taxes for the year 1930.

A claim based on said lease was filed in said bankruptcy proceeding and was allowed in the amount of $8,806.26.

The proof of claim is executed by Simon Lorch and was sworn to before a notary public on October 3, 1934.

The claimant appoints Max Petacque as his attorney to act for him in the reorganization pro-
306 ceedings.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

BY THIS INDENTURE executed this twentieth day of December, 1928, in consideration of the rent and covenants herein reserved and contained, entered into by the parties hereto for themselves, their respective heirs, administrators, successors, legal representatives and assigns, SIMON LORCH, residing at 442 Aldine Avenue, in the City of Chicago, State of Illinois, hereinafter called the

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

LESSOR, doth lease and demise unto UNITED CIGAR STORES COMPANY OF AMERICA, incorporated under the laws of the State of New Jersey, having an office at 189 North Clark Street, City of Chicago, Illinois, hereinafter called the LESSEE,

> Lots one (1) and two (2), in John P. Altgeld's Subdivision of Blocks one (1), Two (2), Three (3), Four (4) and seven (7) and the North half of lot Six (6) in the subdivision of that part lying North Easterly of Lincoln Avenue of the North West Quarter (NW¼) of Section Twenty-nine (29), Township Forty (40) North, Range Fourteen (14), East of the Third Principal Meridian, situated in the City of Chicago, Cook County, Illinois, together with the buildings and improvements of every character located thereon; being the premises situated at the Southeast corner of Belmont and Lincoln Avenues; and known as and by the numbers 3169-3171-3173-3175-3177 Lincoln Avenue and 1547-1549-1551-1553 Belmont Avenue;

with the appurtenances, rights, privileges and easements thereunto belonging.

This demise is subject only to the following leases, tenancies and occupancies

Tenant	Premises		Monthly Rent	Expiration
ray Newart & Co.	2nd & 3rd floors 3169-75 Lincoln Av.	to	$416.66 2/3 4-30-30 500.00 to 4-30-35	4/30/35
ohn R. Thompson	Store—3169 Lincoln Ave. & 1551 Belmont Av. & basement thereunder		550.00 to 4-30-31 600.00 to 4-30-36	4-30-36

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

Tenant	Premises	Monthly Rent	Expiration
C. and C. Gianacopulos	Store—3171 Lincoln Ave. & basement thereunder	450.00 to 4-30-27 500.00 to 4-30-30	4-30
M. Samuels & Co., Inc.	Store—3173 Lincoln Ave. & basement thereunder	350.00 to 4-30-27 375.00 to 4-30-30	4-30
United Cigar Stores Co. of America	corner store 3177 Lincoln Ave.	475.00	4-30

The LESSOR does covenant, warrant, represent and agree that the said leases, which leases have been submitted to LESSEE and have been initialed by it for identification are all of the leases and agreements affecting the said premises, and that the same have not been modified, amended or extended and the LESSOR covenants not to modify, amend or extend the same prior to the commencement of the term of this lease and said leases are hereby assigned, transferred and set over to the LESSEE herein as of the date of the commencement of the term hereunder and during all the rest, residue and remainder yet to come of the term under said respective leases. The LESSOR covenants and agrees that no rents have been paid under any of said leases beyond the commencement of the term of this lease and no deposits have been made by any of the tenants thereunder.

This demise is subject also to the following:

(1) Trust Deed dated June 1, 1928 and recorded June 8, 1928 in the Recorder's office of Cook County, Illinois, as document number 10050631, made by said Simon Lorch and Lena Lorch, his wife, to Foreman Trust & Savings Bank of Chi-

cago, Illinois, to secure their note for Sixty Thou- 313
sand Dollars ($60,000.) due June 26, 1933, with interest thereon from June 26, 1928 at five and one-half per cent (5½%) per annum, payable semi annually on the 26th day of December and June in each year, (but in case the LESSOR, his heirs, executors or assigns, shall default in any of the payments of principal or interest in or under said mortgage, LESSEE shall have the right to pay any sums of principal or interest due under said mortgage as hereinafter provided).

(2) Condemnation proceedings instituted in the 314
Circuit Court of Cook County, Illinois, Law Docket number 71144 or any other condemnation proceedings that may hereafter be instituted whereby it is proposed to take of said demised property the following property or any part of the following property:

> Beginning at a point in the South line of Belmont Avenue, twenty (20) feet east of the intersection of the South line of Belmont Avenue and the North Easterly line of Lincoln Avenue; thence South to a point in the North Easterly line of Lincoln Avenue, twenty-eight (28) feet South Easterly of the 315
> intersection of the North East line of Lincoln Avenue and the South line of Belmont Avenue; thence North Westerly along the North Easterly line of Lincoln Avenue to the North West corner of said lot one (1); thence East to point of beginning,

(but this sub-paragraph (2) shall not be construed as in any way modifying the agreements and covenants of the parties concerning said condemnation proceedings as hereinafter in this lease set forth).

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TO HAVE AND TO HOLD the premises hereby demised unto the LESSEE, its successors and assigns, for the term commencing MAY 1, 1930 and expiring APRIL 30, 1960, unless said term shall be sooner terminated, as hereinafter provided, because of any breach of covenant or default on the part of the LESSEE, in consideration of which demise the LESSEE does hereby take said premises and covenants and agrees:

First: To pay therefor the yearly rent of Twenty-seven Thousand Five Hundred Dollars
317 ($27,500.) for each of the years of said term, payable in equal monthly payments of Twenty-two Hundred Ninety-one Dollars and Sixty-seven Cents ($2291.67), each in advance on the first day of each and every calendar month during said term, at such place as the LESSOR may from time to time previously designate in writing, and in default of such appointment, then at the above stated residence of the LESSOR in Chicago, Illinois. All of said installments of rent shall in all cases be paid without any deduction or abatement whatsoever.

318 Second: All payments of rent and all other sums of money that may become due or payable to the LESSOR under any provision of this lease shall be made by the LESSEE in legal tender of the United States, or if the LESSOR shall so elect, in gold coin of the United States of the present standard of weight and fineness. And it is expressly understood and agreed between the parties hereto that whenever the LESSOR shall elect to have said money owing to him under this lease paid in such gold coin and shall notify the LESSEE in writing at least twenty (20) days prior to the date when such payment falls due, then the pay-

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ment thereafter to be paid to such LESSOR shall be 319
in gold coin until notice to the contrary in like manner shall be given by such LESSOR.

Third: As a further consideration for the leasing of said premises, the LESSEE agrees to and will bear and pay in the name of the LESSOR, in addition to the rents herein reserved, all taxes and assessments, general and special, charges, levies and all other impositions, ordinary and extraordinary, of every kind and nature whatsoever, levied, assessed, charged or imposed upon or against the said premises or any part thereof, or upon or against any building or improvements at any time 320
situated on the demised land, or levied, assessed, charged or imposed upon the interest of the LESSOR in the demised premises or in the fee or reversion thereof, or upon the interest of the LESSOR or of the LESSEE in or under this lease during the term hereof, or upon the rents and other charges herein reserved to the LESSOR, it being understood and agreed that the LESSEE shall pay two-third (2/3) of the general taxes levied against said premises for the year 1930, all of the general taxes levied against said premises for every year thereafter until and including the year 1959 and one-third
(⅓) of the general taxes levied against said prem- 321
ises for the year 1960, and LESSEE further to pay any installment of any special assessment for improvements not completed prior to May 1, 1930 levied prior to May 1, 1930 if said installment shall fall due during the term hereof; all of which said taxes and assessments, charges, levies and other impositions (except two-third (2/3) of the general taxes levied against said premises for the year 1930 and one-third (⅓) of the general taxes levied against said premises for the year 1960) shall be paid by the lessee before the expiration

322 of the time within which the same may be paid, without the addition or accrual of any costs or penalty thereon or thereto, and in any case before any application for judgment in any court to collect the same is made, and within apt time to prevent any sale or forfeiture of the said demised premises or any part thereof on account or by reason of the non-payment thereof. The LESSEE shall and hereby agrees to deliver to the LESSOR from time to time, original or duplicate receipts showing the payment of all such taxes, assess-
323 ments, levies and other impositions, within twenty (20) days after the respective payments evidenced thereby. The LESSOR shall pay to the LESSEE on April 1, 1931, one-third (⅓) of the general taxes levied against said premises for the year 1930, and LESSEE shall pay to the LESSOR on April 1, 1960, one-third (⅓) of the general taxes levied against said premises for the year 1960. If the amount of the general taxes levied for the year 1960 shall not be ascertainable at the time the same are required to be paid by the LESSEE to the LESSOR, as aforesaid, then the LESSEE shall pay to the LESSOR at said time, an amount equal to one-
324 third (⅓) of the general taxes levied against said premises for the preceding year, and when the general taxes for the year 1960 shall have been ascertained and if one-third (⅓) of the general taxes for the year 1960 shall exceed the amount paid by the LESSEE to the LESSOR, then the LESSEE shall promptly pay to the LESSOR such excess; and if it shall be less than the amount paid by the LESSEE to the LESSOR, then the LESSOR shall refund to the LESSEE such excess payment. The LESSEE agrees to pay all water rates taxed, levied or charged upon or against said demised premises for and during the term for which this lease is granted.

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The LESSOR covenants and agrees that he will pay all installments of special assessments levied during said term, but falling due after said term shall have been terminated either by lapse of time or otherwise, expressly excepting any termination of said lease by reason of any breach of covenant or default by the LESSEE of any of the terms of this lease.

Fourth: Nothing herein contained shall be construed to require the LESSEE to pay any so-called inheritance, estate or transfer tax growing out of any inheritance, devise or transfer of the LESSOR's 326
estate in said premises, or of any interest in the reversion of said real estate, nor any so-called income taxes assessed upon or in respect of the income of the LESSOR, or any income taxes chargeable to, or required to be paid by, the LESSOR unless said income taxes shall be specifically levied against the income of the LESSOR derived from the rent by this lease reserved expressly as and for a specific substitute for the taxes, in whole or in part, on the real estate by this lease demised; provided, however, and it is expressly understood and agreed between the parties hereto, that if at
any time hereafter a new form of tax shall in 327
whole or in part be substituted for the present form of taxation in force affecting real estate in the State of Illinois, or for one or more of them as a means of raising revenue, then the LESSEE in any and every such event shall bear and pay each and every of such new taxes that shall be so taxed, assessed, levied, charged or imposed upon or on account of the rents or other charges hereby reserved to the LESSOR or payable by the LESSEE hereunder, or upon or on account of the income of the LESSOR derived from or under this lease or upon or on account of the interest of the LESSOR

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328 in said premises; provided, however, that if the amount or rate of such income taxes so specifically levied against the income of the LESSOR as a specific substitute for the taxes on the real estate by this lease demised should be increased by reason of any other income received or property owned by the LESSOR, then the LESSEE shall not be obligated to pay such increased amount or excess, but only such taxes as the LESSOR would be obligated to pay in case the income received from the aforesaid real estate constituted the only taxable income of the LESSOR.

329 "Fifth: It is expressly understood and agreed, anything in this lease to the contrary notwithstanding, that the LESSOR shall pay the special assessments and any and all installments thereof (Law Docket No. B71144 Circuit Court of Cook County, Illinois, Warrant No. 52310), and/or any other special assessment that has been heretofore, is now, or shall be hereafter levied or assessed against the demised premises, or any portion thereof for the opening and widening of North Ashland Avenue, and/or any special assessment that has been, that is now, or that will hereafter be levied or assessed against the demised premises
330 for the opening and widening of North Ashland Avenue, and for the paving, grading, curbing of any street, and/or doing of any other work that will be necessitated by reason of the taking and/or condemnation at any time of that portion of said demised premises described as follows, or any portion of the following described property, which as stated is a part of the demised property:

"Beginning at a point in the South line of Belmont Avenue, twenty (20) feet east of the intersection of the South line of Belmont Avenue and the North Easterly line of Lin-

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coln Avenue; thence South to a point in the North Easterly line of Lincoln Avenue, twenty-eight (28) feet South Easterly of the intersection of the North East line of Lincoln Avenue and the South line of Belmont Avenue; thence North Westerly along the North Easterly of Lincoln Avenue to the North West corner of said Lot one (1); thence East to point of beginning",

by virtue of condemnation proceedings heretofore instituted by the City of Chicago under petition filed in the Circuit Court of Cook County, Cause B71144, or any other proceedings which may be instituted by the City of Chicago or any other lawful authority in lieu thereof.

And the LESSEE does hereby forego and release any and all claims for any award given or to be given by the City of Chicago, and/or any other lawful authority, by reason of the taking and/or condemnation of said premises described in the preceding paragraph, or any part thereof, in connection with the said opening and widening of North Ashland Avenue. Lessee agrees to promptly execute and deliver to LESSOR any instrument of assignment, conveyance, relinquishment or release of said premises described in said preceding paragraph or any part thereof which may be taken by the City of Chicago, or any other proper lawful authority, so as to enable the LESSOR to secure said award. And the LESSEE covenants and agrees that it will yield up and deliver possession of said premises described in the said preceding paragraph; and LESSEE does hereby agree to cut off and remove, at its own cost and expense, and with all possible diligence and dispatch, the building or portion of any building or buildings stand-

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334 ing upon said premises, described in the preceding paragraph, or any portion thereof, when required under any condemnation proceedings brought by the City of Chicago and/or by any other lawful authority, and LESSEE will at its own cost and expense and with all possible diligence and dispatch restore and rebuild the building on the demised premises to the extent that such restoration and rebuilding are necessitated by the reason of the taking of said land described in the preceding paragraph or any portion thereof, and LESSEE agrees to do said cutting off and removing
335 of said portions of said building as aforesaid and to restore and rebuild the building on the demised premises as aforesaid whether such taking of said land described in the preceding paragraph or any portion thereof takes place before the commencement of the term of this lease or during the term of this lease, and in case of such taking before the commencement of the term of this lease, then the LESSEE agrees to do said cutting off and removing of any portion of any building as aforesaid in this paragraph provided and to restore and rebuild any building as aforesaid in this paragraph provided, as the Agent and Attorney-
336 in-Fact of the LESSOR thereunto duly authorized herein by the LESSOR; but at the lessees' own cost and expense and the LESSOR does covenant and agree that he will pay to the LESSEE the sum of Four Thousand Dollars ($4,000.) cash on the date that the LESSEE has yielded up and surrendered possession of said premises described in the preceding paragraph, in accordance with any condemnation proceedings brought by the City of Chicago and/or by any other lawful authority; and when from the said premises described in the said preceding paragraph the LESSEE has cut off and/or removed any portion of any building or

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buildings standing thereon; and the LESSOR does covenant and agree that he will pay to the LESSEE the said sum of Four Thousand Dollars ($4,000.) cash on the date when from the said premises described in the preceding paragraph the LESSEE has cut off and removed any portion of any building or buildings standing thereon and has restored and rebuilt the building on the demised premises as aforesaid in this paragraph provided, in case the said taking of the premises described in the preceding paragraph, or any portion thereof, occurs before the commencement of the term of this 338
lease. There shall be no abatement of the rent herein reserved nor shall the LESSEE be released from the performance of any of the covenants of this lease in whole or in part by reason of the taking of the whole or any part of said premises described in the preceding paragraph under said proceedings or any proceedings that may be substituted therefor.

Sixth: In case of any neglect, failure, default or omission of the LESSEE to pay and discharge any taxes, assessments, charges, levies, water rates or other impositions covenanted and agreed to be paid by the LESSEE within the time and in the 339
manner herein provided, or to insure or to keep and maintain insurance on the demised building in the manner and to the amount hereinabove provided, or to pay the premiums therefor, or to deliver any such policies to the Trustee, or to keep and maintain the demised premises and other appurtenances, including sidewalks abutting the demised premises, in a safe, secure, clean and sanitary condition, and in good order and repair, or in case of waste, or in case of any lien or charge upon or against the demised premises, or any part thereof, shall arise or be claimed on account of

340 any act, neglect, failure, default or omission of the LESSEE, or anyone claiming under it, by, from, through or under this lease, which may be superior to the Estate and interest of the Lessor, or in the event of any breach of or default in any of the covenants and provisions of this lease, to be kept, observed and performed by the LESSEE, then in every such event and as often as the same shall occur, the LESSOR may, at his option, but without it being obligatory upon him to do so, and without prejudice to any other right or rem-
341 edy of the LESSOR hereunder arising in consequence of such breach or default, (1) pay any such taxes, general or special assessments, charges, levies, water rates, or other impositions, or liens or incumbrances; (2) redeem said premises or any part thereof from any tax sale, tax certificate, judicial or other sale on account of the nonpayment thereof; (3) purchase any tax title or claim upon or against said premises, or any part thereof; (4) procure or effect such insurance or pay the premiums therefor; (5) expend whatever moneys may be necessary to repair, protect and preserve said premises or to restore the same as
342 herein agreed by the lessee; (6) remedy whenever possible any breach or default of the lessee in any of the LESSEE'S covenants in this lease contained, and it shall not be obligatory upon the LESSOR to inquire into the validity of any such taxes, assessments, charges, levies, water rates or other imposition, tax sales, tax certificates or tax titles; and in purchasing, discharging, or cancelling any tax title, the LESSOR shall not be limited to the amount to which the holder of such tax title would be entitled upon the setting aside of his tax title by decree of court, but the LESSOR shall have the right to make such terms with the

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holder of such tax title as the LESSOR may deem proper; and all moneys from time to time advanced or expended by the LESSOR for any such purpose, as well as all moneys advanced or expended by the LESSOR, under the authority of or pursuant to any of the terms or provisions of this lease, or because or on account of any breach or default of the LESSEE in the performance or observance of any of the covenants of this lease, to be kept, observed and performed by the LESSEE, including costs and expenses, shall be so much additional rent due from the LESSEE to the LESSOR, and shall be forthwith repaid by the LESSEE, with interest at seven per cent (7%) per annum from the time of the respective payments thereof by the LESSOR, it being expressly agreed, however (all other provisions of this lease to the contrary notwithstanding), that the LESSEE shall not be required to pay, discharge or remove any tax, assessment, tax lien or other imposition or charge upon or against the said demised premises or any part thereof, so long as the LESSEE shall in good faith proceed to contest the same, or the validity thereof by appropriate legal proceedings, which shall operate to prevent the collection of the tax, assessment, lien or imposition so contested, or the sale of the said premises or any part thereof to satisfy the same, provided, however, the LESSEE not less than five (5) days before any tax, assessment or lien upon the said demised premises shall become delinquent shall give notice to the LESSOR of its intention to contest the validity of the same, and shall deliver to the LESSOR a bond executed by the LESSEE as principal and by some surety company licensed to do business in the State of Illinois, which surety company shall be reasonably satisfactory to the LESSOR as

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346 surety, such bond shall be for the amount of such tax, assessment, tax lien, or other imposition or charge so contested as aforesaid by the LESSEE, to be held and retained by the LESSOR as security for the tax, assessment, lien or imposition so contested, which bond shall be held by the LESSOR until the said premises shall be relieved and discharged from any such tax, assessment, lien or other imposition, and thereupon said bond shall be cancelled by the LESSOR and shall be of no further force and effect, but the LESSEE agrees
347 that it will immediately repay to the LESSOR the amount of any loss, cost, damage and expense, including reasonable attorneys fees, that the LESSOR may sustain or incur in connection with the tax, assessment, lien or imposition so contested; and it is agreed that pending any such legal proceedings the LESSOR shall not have the right to pay, remove or discharge the tax, assessment, lien or other imposition so contested.

The LESSEE shall have the right to contest or review by legal proceedings or in such other manner as it deems suitable, which proceedings, if instituted, shall be conducted promptly at its
348 own expense and free of expense to the LESSOR (but LESSOR covenants and agrees to join in such application and/or does hereby constitute the LESSEE his Attorney in Fact in such contest, if required by laws, requirements, regulations or authorities, wherein premises are located) any taxes, assessments, water rates or charges imposed upon or against the parcel of land, or any building or improvements thereon above described, and in case any such taxes, assessments, water rates or charges as a result of any such proceedings or otherwise be reduced, cancelled, set aside or to any extent discharged, and upon the determination of such

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proceedings, the LESSEE shall pay the amount that shall be finally assessed or imposed against said premises or be adjudicated to be due and payable on any such disputed or contested items. The legal proceedings herein referred to shall include appropriate appeals from any judgments, decrees or orders and certiorari proceedings and appeals from orders therein, but all such proceedings shall be begun as reasonably soon as possible after the imposition of any contested lien and shall be prosecuted to final adjudication with all promptness and dispatch.

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Seventh: The LESSOR covenants and agrees that the demised premises will be delivered to the LESSEE upon the commencement of the term of this lease in as good condition as the same now are, ordinary wear and tear excepted, and free from all valid orders of violation of any Federal, State or Municipal authority, and free from valid complaints and/or valid orders of violations made upon the LESSOR by any Federal, State or Municipal authorities and which shall be pending and undisposed of at the beginning of the term of this lease.

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Eighth: LESSEE covenants and agrees at its own expense at all times during the term of this lease, to keep and maintain said premises in a safe and good condition, order and repair, damage from total or substantial destruction (as such substantial destruction is defined in paragraph Thirty-fourth) of the building or buildings situated upon the demised premises by fire or other casualty or happening during the last three (3) years of the term by reason whereof the LESSEE shall elect to and shall cancel and terminate this lease excepted, and will in every respect comply

352 with all laws, statutes, ordinances of the City of Chicago, health and police regulations and with the direction of public officers and will immediately replace all broken glass with that of the same size and quality as that broken, and will also keep said premises and appurtenances, including sidewalks in front of the demised premises, in a safe, secure, clean and sanitary condition.

Ninth: The LESSEE will not use, suffer or permit to be used said premises or any part thereof for any purpose that will vitiate the insurance
353 thereon and will not commit waste or overloading floors of the demised building or do or permit anything to be done on said premises in any way creating or tending to create a nuisance, or which may in any way tend to impair said premises or any part thereof, nor use, suffer or permit to be used the demised premises for any unlawful purpose and will not use or permit said premises or any part thereof to be used for any immoral purpose.

Tenth: The LESSEE covenants and agrees with the LESSOR that the LESSEE will, at its own cost
354 and expense, at all times during the term of this lease, keep and maintain all buildings at any time situated, or in process of construction, on the demised land properly insured in the name of the LESSOR and LESSEE as their respective interests may appear under this lease against loss or damage by fire in good and responsible insurance companies reasonably satisfactory to the LESSOR for the full insurable value thereof above foundations and will also keep said buildings so insured against loss or damage by tornado or cyclone in an amount of at least fifty per cent (50%) of the full insurable value thereof above foundations, and loss thereunder in all such policies of

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fire insurance, tornado or cyclone insurance shall be made payable to The Foreman Trust and Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of Illinois, or its successors, or such other Trust Company doing business in Chicago, Illinois, having a paid up capital and surplus of not less than $1,000,000. as the Lessor may designate (which Trust Company is some times in this lease referred to as the Trustee), as Trustee, for the insurance hereunder for the benefit of the Lessor and the Lessee as their interests may respectively appear. All of said policies, including fire, tornado, or cyclone insurance, shall whenever procured and at least twenty (20) days before the expiration of any policies about to expire be delivered to and deposited with said Trustee. The Lessee on demand of the Lessor will furnish to the Lessor a full, true and correct list of all insurance policies taken out on such buildings, structures and improvements as said policies shall from time to time be taken out showing the number of the policy, the name of the insured, the amounts of such insurance and the dates of expiration thereof.

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Eleventh: The LESSEE is hereby given the right during the term of this lease to make, at its own cost and expense, any replacements, alterations, improvements or additions to any building or buildings now or at any time hereafter standing upon the demised land, provided, however, that the LESSEE shall not then be in default in the performance or observance of any of the covenants herein contained. And provided further that such replacements, alterations and improvements or additions will not diminish or lessen the value of such building or buildings, nor re-

358 duce the number of stories thereof to less than three (except where lessee demolishes and removes any building situated upon the demised premises and constructs and erects a new building of two stories, then such new two story building as provided for in this lease shall be regarded as a full compliance of the requirements of this lease); and in case such replacements, alterations, improvements or additions are made in any building that may hereafter be erected upon said demised land, said building, not withstanding such
359 replacements, alterations, improvements or additions, shall continue to conform with the requirements in respect to such building permitted to be erected thereon under the provisions of this lease; and further that such replacements, alterations, improvements or additions to the building now or which may hereafter be standing on the demised land, shall be made in a good thorough and workmanlike manner and otherwise in compliance with the requirements of this lease, and that the work shall be diligently prosecuted and completely finished and paid for by the LESSEE. And that no contract or contracts for any such replacements,
360 alterations, improvements or additions to any building or buildings now or at any time hereafter standing upon the demised land, the estimated cost of which may exceed Twenty-five Hundred Dollars ($2500) will be made, entered into or let by the LESSEE without embodying in such contract or contracts an express valid provision that no liens shall attach or accrue by, under or through such contract or contracts, or the work to be done or material furnished thereunder, upon or against the estate, title or interest of the LESSOR in said demised premises.

Twelfth: The LESSEE covenants and agrees that if and as often as the demised building or any

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part thereof shall be damaged, injured or destroyed at any time or times during the term of this lease, whether the loss occasioned by such damage, injury or destruction shall be covered by insurance or not, the LESSEE will in every such case, at its own cost and expense, (1) either within six (6) months after such damage, injury or destruction commence to repair, restore or rebuild said building so that it shall be in substantially the same condition that it was prior to such loss or damage; or (2) within six (6) months after such damage, injury or destruction commence to erect upon said 362
premises a new building of two or more stories as the LESSEE elects, to be constructed, as described and provided in sub-paragraph (b) of paragraph Sixteenth of this lease, provided that the security furnished by such new building for the rents and agreements herein contained shall not be less in value than the building situated upon said demised premises immediately prior to such loss, damage or destruction (it being agreed and understood that a new two story building as provided for in this lease shall be regarded as full compliance by the LESSEE of the requirements of this lease); and in any event the LESSEE agrees to have 363
such repairs, restoration and rebuilding or the construction of a new building completed not later than tweleve (12) months from the date of such damage, injury or destruction, except when prevented from doing so by act of Providence, war, strike, lock-out, unusual action of the elements, or any other cause beyond the control of the LESSEE, in which event the time of completion shall be extended to the extent of such delay. In no event shall the LESSEE be entitled to an abatement of rent on account of any damage or injury to or destruction of any building or any part thereof

364 at any time standing upon the demised land or on account of said demised premises becoming untenantable.

Thirteenth: In the event that any loss by damage, injury or destruction of said demised building shall be covered by insurance, and such insurance shall have been collected by the Trustee, and if the LESSEE shall commence to repair, restore and rebuild the same in conformity with the requirements of this lease, and within the time herein specified, or shall in lieu thereof commence to
365 erect and construct a new building on said demised land in conformity with the provisions of this lease, then and in such case the insurance moneys which shall be received by the Trustee shall be applied as the work progresses as far as it will extend toward the cost of such repairing, restoring and rebuilding or construction of a new building on the demised land, and shall be paid out from time to time upon certificates of the Architect (or of the General Contractor in case said premises shall be repaired or restored) employed by the LESSEE and superintending such re-
366 pairing, restoring and rebuilding or construction; provided, however, that such insurance moneys shall be lastly applied for such purpose, and after other moneys of the LESSEE have been disbursed and expended for such purpose, and provided further that it shall appear to the satisfaction of the Trustee that said insurance moneys received by it shall either alone or together with any other moneys previously expended by the LESSEE, be sufficient to pay for the completion of the building or the repairs thereto in conformity with the requirements of this lease; and on the completion of said building or of said repairs, discharged of all mechanics' liens, the balance of the net pro-

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ceeds of insurance remaining in the hands of the Trustee shall be paid and turned over by the Trustee to the LESSEE free and clear of any claim or right thereto.

Fourteenth: In the event the LESSEE shall fail to commence to repair, restore and rebuild said building within the time herein designated, or having commenced shall fail to diligently prosecute said work to completion within the time herein designated, or shall fail to erect a new building in lieu thereof in conformity with the provisions of this lease, as the case may be, then the LESSEE, 368 in any or either of said events shall not be entitled to have the insurance moneys or any part thereof applied toward defraying the cost of repairing, restoring or rebuilding said demised building, or toward defraying the cost of a new building, and the Trustee shall pay and turn over to the LESSOR said insurance moneys collected by it.

Fifteenth: In case any mortgage or trust deed in the nature of a mortgage shall have been made by the LESSEE conveying the leasehold interest hereby created, and if such mortgage or trust deed shall be in force at the time of the partial or 369 total destruction of the building at any time standing on said demised land by fire or otherwise, then and in such case, if said LESSEE shall fail within five (5) months after the date of the partial or total destruction of said building to commence to repair or rebuild the same or construct a new building on said demised land, in accordance with the terms of this lease, then the mortgagee or trustee under any trust deed in the nature of a mortgage, as aforesaid, is hereby authorized to repair said building or to rebuild the same or construct a new building on said demised land, as

370 the case may be, in compliance with the provisions of this lease, in either of which cases the said mortgagee or trustee under the trust deed so repairing or rebuilding said building or constructing a new building, in accordance with the provisions of this lease, shall be subrogated to all of the rights of the LESSEE herein to have the insurance money that may be collected on account of such loss or damage applied toward the cost of repairing or rebuilding said building or construction of a new building on the demised land, and shall be entitled
371 to have said insurance money paid out upon Architect's or General Contractor's certificates in the same manner in every respect as if such mortgagee or trustee were the LESSEE under this lease.

Sixteenth: The LESSEE may at any time during the term of this lease prior to April 30, 1958, provided the LESSEE shall not then be in default in the performance or observance of any of the covenants herein contained, to be kept, observed and performed by the LESSEE, tear down or remove from the demised land the present building now situated thereon, or any building that may hereafter be
372 situated thereon, solely and only for the purpose of replacing the same with a new building, upon the following conditions which are hereby declared to be conditions precedent:

(a) Said LESSEE before commencing to tear down or remove the said building now situated on the demised land or any building that may hereafter be situated on the demised land, and before commencing to do any work in connection with the construction of a new building thereon, and before letting any contract in connection therewith, shall execute and deliver to the LESSEE a bond in a sum equal to the estimated cost of the removal of such

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building or buildings to be removed and the estimated cost of the new building to be built as such cost shall be estimated by LESSEE'S Architect. Such bond shall be executed by the LESSEE as Principal and by a Surety Company as Surety, such Surety Company to be licensed to do business in the State of Illinois, which Surety Company shall be reasonably satisfactory to the Lessor. Said bond shall be conditioned that the old building will be removed and that the new building will be erected by the LESSEE free and clear of mechanics' liens, pursuant with and substantially in accordance with plans and specifications presented to the LESSOR for his information, but not for his approval, and within the time provided in this lease;

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(b) Said building shall be of modern construction and shall be constructed of brick, iron, stone, concrete and/or tile, or any or all of them, which shall not be less than two stories and shall conform with the laws and ordinances in force in the City of Chicago at the time of the construction thereof and shall cover the whole area of the demised land (with the exception of such space as may be reasonably necessary for light courts and air shafts); the first story thereof above the street grade shall consist of store premises; the upper story or stories above the first floor of such building shall be designed and constructed so as to be suitable for office, commercial, light manufacturing or apartment purposes. The height of the first story above street level of any new building on said demised land shall not be less than twelve feet measured from the upper surface of the first story to the ceiling thereof and the height of each and every story above the first floor thereof shall not be less than ten feet measured in similar manner;

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(c) Said LESSEE before commencing to tear down or remove said building now situated on the demised land or any building that may hereafter be situated on the demised land, and before any work shall be done toward the construction of a new building on said demised land, and before letting any contract in connection therewith, shall furnish to the LESSOR plans and specifications, and an estimate, certified by LESSEE'S Architect, of the cost of said new building, which plans and specifications and certified estimate of the cost of said new building shall be furnished as provided by the LESSEE to the LESSOR for the information only of the LESSOR, but not for the purpose of obtaining the written consent thereto of the LESSOR. Said LESSEE covenants and agrees that said new building will be constructed substantially in accordance with the plans and specifications so furnished to the LESSOR and that a copy of said plans and specifications and of said certified estimate of the cost of said new building may be retained by the LESSOR. The LESSOR shall have the right in person and by Agent to inspect the work on said building as the same progresses.

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Seventeenth: Immediately after the tearing down or removal of the present building on the demised land or any building that may hereafter stand on the demised land, the LESSEE shall commence to erect said new building, shall diligently prosecute the erection thereof to completion and shall fully complete said building within twelve months from the commencement thereof as aforesaid, unless prevented from doing so by act of Providence, strike, lock-out, unusual action of the elements, or any other cause beyond the control of the LESSEE, in which event the time for completion shall be extended to the extent of such delay.

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Eighteenth: The Trustee shall in no event be responsible for the collection or non-collection of any insurance moneys or for the failure or refusal of any insurance company or other insurer to pay any moneys due or liquidate any loss but only for such insurance moneys as shall actually come into the hands of the Trustee. In no event shall the Trust Company be obligated (but it shall have the right) to examine or inquire into the propriety of the issuance of any Architect's certificate upon which it may pay as aforesaid, nor shall it be in any way responsible for the proper 380
application of any insurance moneys after the same shall have been paid out by it pursuant to the provisions of this lease.

The Trustee shall not be obligated to invest or place at interest any insurance money which it may receive hereunder, but any interest or income received thereon by the said Trustee shall be applied, used and paid out with the principal thereof as herein directed. The Trust Company shall be entitled to be paid its reasonable costs and charges for its services rendered hereunder. All such costs and charges of said Trust Company shall be paid by the LESSEE. 381

Nineteenth: Nothing in this lease contained shall authorize the LESSEE to do any act which shall in any way encumber the title of the LESSOR in and to said premises, nor shall the interest or estate of the LESSOR herein be in any way subject to any claim by way of lien or encumbrance, whether claim by operation of law or by virtue of any express or implied contract of the LESSEE, and any claim to a lien upon said demised premises arising from any act or omission of the LESSEE shall accrue only against the leasehold interest hereunder of the LESSEE and shall in all respects be

382 subject and subordinate to the paramount title and rights of the LESSOR in and to said premises.

Twentieth: It is made an express condition of this lease that no lien shall attach to said demised premises or any part thereof, or to the estate of the LESSOR in the demised premises by virtue of any law heretofore or which may hereafter be enacted by reason or on account of any work, labor or services done or performed, or materials furnished for, upon, about or in connection with said demised premises or its appurtenances, or for
383 or on account of or to be used for the erection or construction, repairing or alteration of any building, addition or improvement on the demised premises or its appurtenances, or any part thereof, at any time. The Lessee, its contractors and subcontractors and all persons whomsoever hereby waive and disclaim all right to any mechanic's lien on said premises or any part thereof or on the estate of the LESSOR therein for work, labor or services done or performed or materials furnished or to be used therefor or thereon, or for the furnishing or doing of any matter or thing for, in
384 or upon said premises, permitted or required by any laws, ordinances or regulations now or hereafter in force or by the terms of this lease or otherwise (done with or without the knowledge or consent of the LESSOR).

Notice is hereby given to each and every contractor, subcontractor and every person whomsoever who shall or may do any work or labor or perform any services or furnish any materials in, upon, about or for or on account of or to be used for said demised premises or its appurtenaances, or for the erection, construction, repair or restoration of any building, addition or improvement on the demised premises or any part thereof, or who

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shall be requested to furnish or perform work, labor or services, or furnish materials therefor, that no lien shall attach or accrue to said demised premises or any part thereof or to the estate of the LESSOR in the demised premises under any law heretofore or hereafter enacted by reason or on account of the doing or performing of any such work, labor or services or the furnishing of any such materials, and every such contractor, sub-contractor and other persons and the whole world shall take notice of this provision and shall be held chargeable with notice thereof and be bound thereby. 386

Twenty-first: The LESSEE will allow the LESSOR and his Agents at all reasonable times free access to the premises hereby leased for the purpose of examining or inspecting same or exhibiting the same to prospective purchasers and said LESSOR shall also have the right to place and maintain upon said premises for and during the last three months of the term of this lease signs advertising said premises for rent and the LESSEE will not interfere or cause the same to be interfered with.

Twenty-second: The LESSEE agrees that it will 387 at all times indemnify and save, protect and keep harmless the LESSOR in said demised premises and the estate of the LESSOR in said demised premises from every and all loss, cost, damage, liability, expense, penalty and fine whatsoever, which may arise from or be claimed against the LESSOR or against the demised premises, or against the estate of the LESSOR in said demised premises, by any person or persons or any claimant for any injuries to person or property, or damage of whatsoever kind or character, consequent upon or arising from the use or occupancy of said premises

388 by the LESSEE, or consequent upon or arising from any neglect or fault of the LESSEE or anyone occupying said premises under the LESSEE in the use or occupancy of said premises, or consequent upon or arising from the sale or giving away of intoxicating liquors, or consequent upon or arising from any failure of said LESSEE to comply and conform with all laws, statutes, ordinances and regulations of the United States, the State of Illinois, or the City of Chicago, now and hereafter in force, or by reason of the use or occupation of
389 or intrusion upon or under any street or alley or any part thereof adjoining said demised premises, by the LESSEE or anyone occupying said demised premises or any part thereof under the LESSEE; and if any suits or proceedings shall be brought against the LESSOR or against the said demised premises or against the estate of the LESSOR therein on account of any alleged violation thereof or failure to comply and conform therewith, or on account of any damage, omission, neglect or use of said premises by the LESSEE, that the LESSEE will defend the same and will pay whatever judgment or judgments that may be recovered against the
390 LESSOR or against the said demised premises, or against the LESSOR'S estate therein.

Twenty-third: Said LESSEE further covenants and agrees to and with the said LESSOR that if default shall at any time be made by said LESSEE or its assigns in the payment of the rent when due as aforesaid, after any installment thereof becomes due and payable, and such default shall continue for ten (10) days after notice in writing thereof to the LESSEE, or if default shall at any time be made in any of the covenants herein contained to be kept, observed and performed by the LESSEE and such default shall continue for thirty (30) days

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after written notice of such default shall have been given the LESSEE, or if the LESSEE shall abandon said premises during the term of this lease, the LESSOR may terminate this lease with or without further notice to the LESSEE or to any other person; and upon termination of this lease whether by forfeiture or at the expiration by lapse of time of the term hereby demised, or otherwise, the LESSEE will at once remove all effects therefrom and yield up and surrender immediate possession of said premises to the LESSOR, and if such possession be not immediately surrendered, the 392
LESSOR may forthwith re-enter said premises either with or without process of law, and re-possess himself thereof as of his former estate and remove all persons and effects therefrom, using such force as may be necessary, without being deemed guilty of any manner of trespass or forcible entry or detainer. And Lessee expressly waives the service of any notice of intention to terminate this lease or to re-enter said premises and excepting only such notice of default as is hereinabove provided, waives the service of any and every other notice or demand prescribed by any statute or other law. No receipt of moneys by the LESSOR from the 393
LESSEE after the termination of this lease in any way shall reinstate, continue or extend the term of this lease, or effect any notice given the LESSEE prior to the receipt of such money. The LESSOR, at his option, may, however, re-enter said premises, in the manner hereinabove provided, without such re-entry working a forfeiture of the rents to be paid and the covenants to be performed and observed by the LESSEE during the term of this lease, or releasing, in whole or in part, the LESSEE from its obligation to pay rent hereunder according to the provisions hereof for and during the remainder

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394 of the term of this lease, and may relet the demised premises, in whole or in part, to any person, firm or corporation other than the LESSEE, for such time expiring either before or after the end of the term of this lease by lapse of time as the LESSOR may in his own absolute discretion determine upon, and upon all such provisions and conditions as to rental and all other matters as the LESSOR in his like discretion may determine; and it is further expressly covenanted and agreed that in case any such reletting is made by the LESSOR
395 and the rental thereby received each month, for the period from the commencement thereof to the end of the term of this lease by lapse of time (after deducting from said rentals actually received, commissions for renting, the cost of repairing, altering or in any way remodelling the premises herein demised for the purpose of reletting them and expenses paid or incurred by the LESSOR in connection with the said reletting) shall be less than the monthly rental for such period required to be paid by the LESSEE under the terms of this lease, then the LESSEE covenants and agrees to and will pay satisfy such deficiency, monthly.

396 Twenty-fourth: If the LESSEE shall not remove all effects from said premises when the LESSOR shall become entitled to re-enter and take possession of said demised premises, the LESSOR may at his option, remove all or any of them in any manner the LESSOR may choose, and the LESSEE agrees to pay all costs of said removal and also any storage costs incurred by the LESSOR in connection with the removal and storage of said effects, or the LESSOR may, at his option, without notice, sell all or any of said effects and apply the proceeds of said sale to the payment of any indebtedness of the LESSEE to the LESSOR.

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Twenty-fifth: If at the termination of this lease, whether by lapse of time or otherwise, the LESSEE shall fail to yield up and surrender immediate possession of said premises to the LESSOR, the LESSEE shall pay as liquidated damages for the whole time that such possession is with-held, the sum of One Hundred and Fifty Dollars ($150.00) per day for the time it shall retain possession of said premises or any part thereof after the termination of this lease, whether by lapse of time or otherwise; but the provisions of this clause shall not be held as a waiver by the LESSOR 398 of any right of re-entry as hereinabove provided, nor shall the receipt of said rent or any part thereof or any other act in apparent affirmance of the tenancy operate as a waiver of the right to forfeit this lease and the term hereby granted for the period still unexpired for any breach of any of the covenants of the LESSEE herein contained.

Twenty-sixth: The LESSOR shall have a first lien upon the interest of the LESSEE under this lease, to secure the payment of all moneys due hereunder, which lien may be foreclosed in equity at any time when money is overdue under this 399 lease; and in case of any such foreclosure proceedings the LESSOR shall be entitled to have a Receiver appointed for said leasehold interest to take possession of said premises, and he may relet the same under the order of the Court appointing him.

Twenty-seventh: Upon the termination of this lease, whether by forfeiture or lapse of time or otherwise, or when the LESSOR shall be entitled to the possession of the demised premises, the LESSEE will at once surrender and deliver up to the

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400 LESSOR the demised premises, together with all improvements thereon, in as good order and repair as when delivered to it, ordinary wear and tear and damage from total or substantial destruction (as such substantial destruction is defined in paragraph Thirty-fourth) of the building situated upon the demised premises by fire or other casualty or happening during the last three (3) years of the term, by reason whereof the LESSEE shall elect to and shall cancel and terminate this lease, excepted, and any part or portion of the demised premises which shall have
401 been taken or condemned by the City of Chicago and/or any other lawful authority for a public or quasi public use, excepted, and that all buildings and improvements then standing upon the demised land shall belong to the lessor, and that no compensation whatever shall be paid or allowed therefor by the LESSOR. The LESSEE and its undertenants, however, shall have the right to remove from the demised premises all trade fixtures.

Twenty-eighth: The LESSEE may sell or convey or assign its interest in said demised prem-
402 ises at any time hereafter, provided, however, that at the time of such sale, conveyance or assignment the LESSEE shall not be in default in any of the covenants and agreements herein contained, to be kept, observed and performed by the LESSEE, and shall have paid all rents, taxes, assessments, insurance premiums and all other charges of every kind which shall have accrued under this lease at the time of any such sale, conveyance or assignment, and provided further that such sale, conveyance or assignment by the LESSEE whether immediate or remote, shall be evidenced by an instrument in writing duly executed under seal

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and acknowledged by the parties thereto, wherein and whereby such assignee or assignees shall expressly accept in writing such conveyance or assignment, and assume all the covenants and provisions in this lease contained, to be kept, observed and performed by the LESSEE and be bound to comply therewith to the same extent as the original LESSEE herein. The LESSEE covenants that it will record or cause to be recorded such instrument of sale, conveyance or assignment and acceptance thereof by the assignee within ten (10) days after the execution thereof, and further covenants that it will deliver or cause to 404
be delivered to the LESSOR within said time, at the place where the rent hereunder shall at such time be payable a duly executed counter-part of such instrument of sale, conveyance or assignment and acceptance thereof by the assignee, together with a memorandum of the address of such assignee or assignees. The LESSEE covenants and agrees that he will not make any sale, conveyance or assignment of this lease except in the manner and upon the conditions above set forth; any attempted sale, conveyance or assignment of the LESSEE'S interest in the demised premises with- 405
out complying with the covenants and conditions aforesaid shall be null and void.

Twenty-ninth: LESSEE shall at all times remain and continue to be primarily liable to the LESSOR for the prompt payment of the rent herein reserved and for the performance and observance of all of its covenants in this lease contained, in like manner and with like effect as if no assignment of this lease had been made by the LESSEE; but the LESSOR shall be limited only and at all events to one satisfaction for any debts

406 or obligations which may accrue under or by virtue of this lease or assignment thereof.

The LESSOR covenants and agrees that in case the original LESSEE shall sell, convey or assign its interest in the said demised premises at any time hereafter in accordance with the provisions in this lease contained, that nevertheless the LESSOR will serve upon the original LESSEE any notice of default and/or any other notice which the LESSOR is required to serve upon the LESSEE herein in the manner provided in this lease.

407 Thirtieth: The LESSEE further covenants and agrees that it will not permit any transfer by operation of law (other than through the death of any immediate or remote assignee of the original lessee, if any such assignee shall be an individual) of any interest of the LESSEE in the demised premises acquired by this lease, nor by any other involuntary alienation of the same, except as hereinafter provided by foreclosure of a mortgage or trust deed in the nature of a mortgage. Any person or persons who shall acquire the title or ownership of the leasehold interest hereunder through the death of any immediate
408 or remote assignee of the original LESSEE (if any such assignee shall be an individual) shall within ninety (90) days thereafter execute, acknowledge and deliver to the LESSOR and record an instrument in writing under seal of like tenor and effect as the instrument required to be executed, acknowledged and delivered by any person acquiring the title to or ownership of said leasehold interest by foreclosure of a mortgage or trust deed in the nature of a mortgage as is hereinafter provided.

Thirty-first: It is expressly understood and agreed that nothing contained in this lease shall be construed to limit or restrict the right of the

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LESSEE to mortgage its interest in the demised premises or to convey and assign the same by trust deed in the nature of a mortgage to secure the payment of a loan of money, and the LESSEE is hereby expressly given the right at any time to mortgage its interest in said demised premises by mortgage or trust deed in the nature of a mortgage, provided that the LESSEE shall then not be in default in any of the covenants and agreements herein contained to be kept, observed and performed by the LESSEE. No mortgagee or trustee or anyone claiming under them, by through or under such mortgage or trust deed, or the owners or holders of the indebtedness secured thereby, shall by virtue thereof acquire any greater rights in the premises than the LESSEE shall then have under this lease, and such mortgage or trust deed shall be subject to all of the conditions, covenants and obligations of this lease and to the rights of the LESSOR hereunder; it is hereby expressly provided that neither the mortgagee nor the trustee in any such trust deed, nor the owners or holders of the indebtedness secured by any such mortgage or trust deed shall become personally liable upon any of the covenants or agreements of this lease until such time as their assigns shall become the absolute owners of the leasehold interest created by this lease.

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(a) It is further understood and agreed, however, and it is hereby made an express condition of this lease, that no purchaser of the leasehold interest pursuant to any decree, judgment, writ, process, execution or sale thereunder, or in any other manner provided, or which may be provided or allowed by law for foreclosing or enforcing mortgages or trust deeds in the nature of mortgages, shall acquire absolute title to or ownership

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412 of the leasehold interest hereby created, unless and until such person or persons shall properly execute, acknowledge and deliver to the lessor a valid and binding instrument in writing under seal, directly enforceable by the LESSOR wherein and whereby such person or persons about to acquire the absolute title to or ownership of the leasehold interest hereby created shall assume and agree to pay all the rent herein reserved and expressly assume and agree to personally keep, observe and perform and be bound by all of the covenants, agreements, provisions and conditions
413 of this lease to be kept, observed and performed by the LESSEE and be bound to comply fully to the same extent and in like manner as the original LESSEE herein, and shall file such instrument for record in the Recorder's office of Cook County, Illinois, and shall also deliver to the LESSOR within twenty (20) days after the execution thereof, at the place where the rent hereunder shall at such time be payable, a duly executed counter-part of such instrument, together with a written memorandum of the business address of such person or persons.

414 (b) Any person or persons acquiring title to and ownership of the leasehold interest hereby created in any manner mentioned herein shall become personally liable for the payment of the rent herein reserved and for the performance and observance of all the covenants, agreements, provisions and conditions of this lease to be performed and observed.

Thirty-second: It is hereby covenanted and agreed by and between the parties hereto that neither the LESSOR nor the LESSEE will sign any petition, consent or other instrument in writing whereby any person or corporation other than the

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LESSEE or those claiming under the LESSEE, shall directly or indirectly acquire the right to use or occupy any portion of any street or alley upon which the demised premises abuts, or the space above or under the surface thereof, without the other party hereto joining in such instrument or consenting in writing to the execution thereof, it being agreed that in all cases whereby law the consent or petition of the owner of the property in question is required for the purpose of any public grant whatever, the joint consent of the LESSOR and LESSEE herein shall be necessary. 416
Excepting, however, the present condemnation proceedings, or any condemnation proceeding substituted therefor, for the taking of that portion (or any part of that portion) of the demised property set forth in quotation marks on page 8 (eight) of this lease.

Thirty-third: The LESSEE may sublet the demised premises or any part thereof for any lawful purposes which shall not be extra hazardous on account of fire, subject to the terms of this lease.

Thirty-fourth: It is especially covenanted and agreed by and between the parties hereto, anything in this lease contained to the contrary notwithstanding, that in case the building or buildings situated upon the demised premises shall be totally or substantially destroyed by fire or other casualty or happening at any time during the last three (3) years of the within term (and it is covenanted and agreed that a damage or destruction of such building by fire or other casualty or happening to the extent of at least one-third of the insurable value of such building shall be regarded as a substantial destruction of such building within the meaning of this paragraph), the LESSEE shall have the right and option to ter- 417

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418 minate the within lease by sending written notice of cancellation by registered mail, addressed to the LESSOR and mailed to him at 442 Aldine Avenue, Chicago, Illinois, or to such other address as the LESSOR may in writing designate from time to time, within thirty (30) days from the date of such total or substantial destruction, and any unearned rent and taxes paid in advance shall be refunded to the LESSEE as of the date of such total or substantial destruction of said building or buildings. If the LESSEE elects to terminate this
419 lease under the provisions in this paragraph contained, then all insurance moneys shall be paid to or shall remain with the LESSOR as his own money.

Thirty-fifth: The LESSEE covenants and agrees with the LESSOR that in case the LESSOR shall without any fault on his part be made a party to any litigation commenced by or against the LESSEE by reason of this lease, then the LESSEE shall and will pay all costs and reasonable attorneys fees paid or incurred by or imposed on the LESSOR by or in connection with such litigation; and the LESSEE also covenants and agrees to pay and dis-
420 charge all costs, attorneys fees and expenses which may be paid or incurred by the LESSOR in enforcing any of the covenants and agreements herein of the LESSEE or in preventing a breach thereof, or incurred on account of a breach or default by the LESSEE in any of the covenants herein contained.

Thirty-sixth: All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the LESSOR, or to one of the Vice-Presidents of the LESSEE or to any other Executive officer of the

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

421

LESSEE, or shall be sent by registered mail addressed to the party intended to be notified at its last known Post Office address, and notice given as aforesaid shall be a sufficient service thereof. Until the LESSOR notifies the LESSEE in writing to the contrary, all notices required or agreed to be given hereunder by LESSEE may be sent by registered mail, addressed to the LESSOR at 442 Aldine Avenue, Chicago, Illinois. Until the LESSEE notifies the LESSOR in writing to the contrary, all notices required or agreed to be given hereunder by the LESSOR may be sent by registered mail, 422
addressed to United Cigar Stores Company of America, 189 North Clark Street, Chicago, Illinois.

If at the time of making, giving or serving of any declaration, demand or notice as aforesaid, the estate or interest hereunder of the LESSEE shall be encumbered by mortgage or trust deed in the nature of a mortgage in accordance with the provisions of this lease, and if such mortgage or trust deed shall have been duly recorded in the Recorder's office of Cook County, Illinois, and if the LESSOR shall have been notified in writing of the existence of such mortgage or trust deed and of the address of the mortgagee or trustee, 423
then a copy of such declaration, demand or notice (except notice of default in the payment of rent) shall also either (1) be delivered or cause to be delivered to said mortgagee or trustee, or some officer or employee of such mortgagee or trustee, or (2) sent to said mortgagee or trustee by registered mail, portage prepaid, at his or its address given to the LESSOR as aforesaid, and such mortgagee or trustee may within such time comply with such notice. The mortgagee or trustee shall not, however, be entitled to notice of default in the payment of the rent or any installments thereof

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

424 required to be paid by the LESSEE. In no case shall any notice to any bond holder, note holder or other owner or holders of any indebtedness or obligations secured by or claiming under any mortgage or trust deed be under any circumstances required.

Thirty-seventh: The LESSOR represents there is now outstanding against the said described premises that certain Trust Deed made and entered into on June 1, 1928, between said Simon Lorch and Lina Lorch, his wife, as parties of the first
425 part, to The Foreman Trust and Savings Bank, a corporation of Illinois, as Trustee, and as party of the second part, which Trust Deed was recorded on June 8, 1928 in the Recorder's office, Cook County, Illinois, as document 10050631 and which Trust Deed was given as security for the payment of the principal note of said Simon Lorch and Lina Lorch, his wife, for the sum of Sixty Thousand Dollars ($60,000.) maturing on June 26, 1933, with interest thereon at the rate of five and one-half per cent (5½%) per annum, payable semi-annually; and said LESSOR further represents that the said Trust Deed is the only
426 mortgage existing against the said demised premises: that it is further expressly understood and agreed that should the said LESSOR default in the payment of the principal sum or any interest installment in said Trust Deed as and when the same is due, or in any other of the covenants included in said Trust Deed, the LESSEE, in addition to any and all other rights and remedies it may have at law or in equity, or under this lease, shall have the right itself to pay such principal sum or installments thereof, or interest thereon, or to make good any such default, and any and all such sums so paid or advanced by the LESSEE

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

427

shall be treated and considered as rent paid in advance to the LESSOR under this lease, and the LESSEE shall be credited with seven per cent (7%) interest thereon from the date of such payments until such sums so advanced are absorbed by application upon the installments of rent reserved and due under this lease.

The LESSEE covenants and agrees that the within lease shall be and is subordinate to any extension of the said mortgage or to a new mortgage, providing the aggregate amount of any mortgages to which this lease will be subordinated shall not 428
exceed in the aggregate the sum of One Hundred Thousand Dollars ($100,000.); and in such event the LESSEE agrees that it will execute an agreement subordinating the within lease to any such extension of mortgage, or to any new mortgage made in accordance with the conditions hereinbefore stated.

It is further understood and agreed by and between the parties hereto that if the LESSOR, his heirs, executors, administrators or assigns, shall default in the payment of the principal or interest upon any of said mortgages or any mortgage of the LESSOR at any time outstanding against 429
the said described premises or in the performance of any other obligation of the mortgagor thereunder, and the LESSEE shall be and it is hereby authorized in the name and as the Agent or Attorney in Fact of the LESSOR or otherwise to pay any such sum or sums of principal or interest due under the said mortgage or mortgages and to make good such default. The LESSOR agrees to promptly repay to the LESSEE all sums so expended by it with interest at the rate of seven per cent (7%) per annum and the LESSEE shall be entitled from time to time to deduct all

430 such sums so paid by the LESSEE together with interest at the rate of seven per cent (7%) per annum, and together with all necessary expenses and reasonable attorneys fees from the rentals falling due hereunder.

The LESSOR covenants and agrees that in the event of receipt by him of notice of default under said existing mortgage or under any mortgage at any time existing against said premises, he will promptly and within five days after the receipt of same serve a notice thereof upon the LESSEE; and LESSOR further agrees that it will give to
431 LESSEE notice of any legal or equitable proceedings instituted against him because of the said mortgage or because of any mortgage at any time existing against said premises, and agrees that LESSEE if it so desires may have the right to intervene in any such proceedings and defend the same.

Thirty-eighth: Neither the rights herein given to receive, collect, issue for or distrain for any rent or rent moneys or payments or to enforce any of the terms, provisions and conditions of this lease, or to prevent a breach or non-observ-
432 ance thereof, nor the exercise of any such rights or of any other right or remedy hereunder or otherwise granted or arising, shall in any way affect or impair or toll the right or power of the LESSOR to declare the term hereby granted ended and to terminate this lease as herein provided, or impair or toll the right of the LESSOR to the possession of said premises, because of the LESSEE's default in or breach of any of the covenants, provisions or conditions of this lease.

Thirty-ninth: It is mutually covenanted and agreed that the various rights and remedies of the LESSOR contained in this lease shall be con-

strued as cumulative and shall be in addition to any and every other remedy given hereunder, or now or hereafter existing by law, and no one of them as exclusive of the others, or exclusive of any rights or remedies allowed by law, and every right and remedy given hereunder to the LESSOR, or allowed by law, may be exercised from time to time and as often as occasion may arise or as may be deemed expedient. No delay or omission of the LESSOR to exercise any right arising from any default shall impair any such right, and that no waiver of a breach of any of the covenants of the LESSEE in this lease contained shall be construed to be a waiver of acquiescence in or consent to any succeeding breach of the same or different covenant, and that the words "default" and "breach" wherever used in this Indenture shall be construed as synonymous with each other; wherever the words "building", "demised building", "premises" and "demised premises" appear in this Indenture they shall be held and taken to mean and include, except as is otherwise herein expressed, not only the building now situated on the demised land, but also any additions thereto and any building or buildings and improvements which may at any time hereafter be erected by the LESSEE or which may at any time be standing on the demised land.

Fortieth: All of the terms and provisions of this lease shall extend to and be binding upon, apply and inure to the benefit not only of the LESSOR and of the LESSEE, but also wherever capable of being so applied, of their respective successors, heirs, legal representatives and assigns, and whenever in this Indenture reference is made to either of the parties hereto it shall be held to include and apply wherever applicable also to the suc-

436 cessors, heirs, legal representatives of such party, the same as if in each and every case so expressed.

Forty-first: It is expressly understood and agreed by and between the parties hereto that in no case shall the LESSOR be liable upon or under any express or implied covenant of this lease for any damage whatsoever to the LESSEE beyond the loss of the rent reserved by this lease accruing after the act or breach of covenant for which damages may be sought to be recovered against the
437 LESSOR, and in the event that the LESSEE shall be ousted from the possession of the said premises by reason of any defect in the title of the LESSOR, then the LESSEE shall not be required to pay rent under this lease while it is so deprived of the possession of the said premises, and said LESSEE may, at its option terminate this lease in any such event, and the LESSOR shall not incur any liability by said ouster beyond the loss of rent while the LESSEE is so deprived of the possession of the said premises.

Forty-second: And the said LESSOR does cove-
438 nant that the LESSEE on paying the said yearly rent and performing the covenants as aforesaid shall and may peaceably and quietly have hold and enjoy the said demised premises for the term aforesaid.

Lina Lorch, wife of said Simon Lorch, joins in the execution of this lease for the purpose of evidencing her consent in writing and approval to the said lease and the covenants and agreements therein contained and to the execution thereof, and for the purpose of releasing any right of dower in the said demised premises as against the LESSEE its successors and assigns.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5286).

439

IN WITNESS WHEREOF, the said Simon Lorch, has hereunto set his hand and seal and UNITED CIGAR STORES COMPANY OF AMERICA has caused these presents to be executed for it and in its behalf by its Vice-President thereunto duly authorized by resolution of its Board of Directors and its corporate seal to be hereunto affixed all on the day and year first above written.

SIMON LORCH (Seal)
LINA LORCH (Seal)

UNITED CIGAR STORES COMPANY OF AMERICA, 440

By J. L. POSEY,
Vice President.
(Seal)

State of Illinois,
County of Cook—ss.:

I, MAX W. PETACQUE a Notary Public, DO HEREBY CERTIFY that SIMON LORCH and LINA LORCH, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument appeared before me this day in person and acknowledged that they signed, 441 sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 20th day of December, 1928.

MAX W. PETACQUE.
Notary Public.

Statement of Trustee's Objection to Claim of Simon Lorch (No. 5286).

442

State of Illinois,
County of Cook—ss.:

I, ELIZABETH MEEHAN a Notary Public, in and for said County, in the State aforesaid, DO HEREBY CERTIFY that J. L. POSEY, personally known to me to be the same person whose name is subscribed to the foregoing instrument as Vice-President of United Cigar Stores Company of America, and personally known to me to be such Vice-President, appeared before me this day in person and acknowledged that he signed, sealed and delivered
443 the said instrument as his free and voluntary act and as the free and voluntary act of said United Cigar Stores Company of America, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 21st day of December, 1928.

ELIZABETH MEEHAN
Notary Public.

Statement of Trustee's Objection to Claim of Simon Lorch (No. 5286).

444 The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of Simon Lorch (No. 5286) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5286 by Simon Lorch (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $241,193.90 with interest. Your petitioner

objects to the allowance of said claim for the following reasons: 445

The Trustee objects to the allowance of this claim in whole or in part for the reason that the lease upon which the claim is based was never rejected by the Trustee in Bankruptcy. Moreover, by agreement dated October 19, 1932 the Trustee and the Debtor assigned to the claimant their respective right, title and interest in and to said lease, and by said agreement the claimant assumed all existing and future obligations required under said lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder. 446

Trustee's Exhibit 14, April 2, 1935.

(Marked in evidence at folio 900.)

ASSIGNMENT AGREEMENT

GRF:EM #598

ASSIGNMENT AGREEMENT, made this 19th day of October, 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, SIMON LORCH of 318 West Adams Street, Chicago, Illinois, (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part. 447

1. The Landlord and the Bankrupt are parties to a written agreement of lease dated December

Trustee's Exhibit 14, April 2, 1935.

448 20, 1928, (hereinafter called the Lease), whereby there was leased to the Bankrupt certain premises located at southeast corner of Belmont and Lincoln Avenues, and known as and by the numbers 3169-3171-3173-3175-3177 Lincoln Avenue and 1547-1549-1551-1553 Belmont Avenue, Chicago, Illinois, (hereinafter called the Premises), for a term commencing May 1, 1930 and expiring April 30, 1960.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with
449 the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated Dec. 5, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon
450 the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to Simon Lorch any and all of the right, title and interest

Trustee's Exhibit 14, April 2, 1935.

of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth. 451

SECOND: The Bankrupt hereby assigns to Simon Lorch any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less the amount of such rent, if any, theretofore paid to the Landlord. 452

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee. 453

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, in-

454 cluding without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreements with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease
455 and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

RIDER IS ATTACHED HEREAT

Nothing in this ARTICLE FIFTH shall be deemed
456 a waiver by the landlord of the right to prove against the bankrupt estate any provable claim to which the bankruptcy court may adjudge the landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the trustee from contesting such proof or allowance.

Nothing in this ARTICLE FIFTH shall be deemed a waiver by the landlord and/or The Fidelity & Casualty Company of New York, a New York

corporation, to prove against the bankrupt estate 457
any provable claim arising from or by reason of the execution by said Fidelity & Casualty Company of New York of a certain bond bearing Number 1442519, dated May 26, 1932, for the penal sum of Three Thousand Seven Hundred Fifty-seven Dollars and Eight Cents ($3757.08) in which bond said Fidelity & Casualty Company of New York is the surety and the said United Cigar Stores Company of America is the principal, and said landlord is the obligee; said bond having been executed and delivered to said landlord in connection with general taxes on said 458
premises for the year 1930 as is more specifically stated in said bond. But the provisions of this Paragraph shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord or said Fidelity & Casualty Company of New York from the necessity of proving and obtaining the allowance of any such claim or preclude the trustee from contesting such proof or allowance.

It is further understood and agreed that the within assignment of said lease or of the leases set forth in the schedule thereto attached or of any one or more of said leases is not intended by 459
the parties hereto to operate as a merger of said leases with the interest of the landlord as the fee owner of said premises.

This Rider and the provisions hereof are a part of a certain assignment agreement dated October 19, 1932 entered into between IRVING TRUST COMPANY of 625 Madison Avenue, New York City, as trustee in bankruptcy of United Cigar Stores Company of America, as party of the first part, SIMON LORCH of 318 W. Adams Street, Chicago, as party of the second part, and UNITED CIGAR

Trustee's Exhibit 14, April 2, 1935.

460 STORES COMPANY OF AMERICA of 625 Madison Avenue, New York City, a New Jersey Corporation, as party of the third part.

IRVING TRUST COMPANY,
as Trustee in Bankruptcy for United
Cigar Stores Company of America.
By JOSEPH T. STEARNS
Assistant Secretary.
(Seal)

SIMON LORCH
Landlord

461

UNITED CIGAR STORES COMPANY
OF AMERICA
By GEO. J. WISE,
Vice-President.
(Seal)

(End of Rider)

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assign-
462 ment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or

caused the same to be duly executed in their respective names, all as of the day and year first above written. 463

IRVING TRUST COMPANY,
as Trustee in Bankruptcy for United
Cigar Stores Company of America.
By JOSEPH T. STEARNS
Assistant Secretary.
(Seal)

SIMON LORCH
Landlord.

UNITED CIGAR STORES COMPANY OF AMERICA. 461

By GEO. J. WISE,
Vice-President.

SCHEDULE OF SUBLEASES:

TENANT, PREMISES, EXPIRATION

Mark B. Solomon, Store No. 1 Basement, April 30, 1936
Joseph Berg, Store No. 2, June 30, 1933
Lakeview Radio Co., Inc., Store No. 3, January 31, 1933 465
John R. Thompson, 3169 Lincoln Ave., Basement, April 30, 1936
Nathan H. Rosen, 2nd Floor Space, April 30, 1935
Charles H. Kaplan, Space on 2nd & 3rd Floors, April 30, 1935
Oscar Sanders, Space on 3rd Floor, Month to Month
Leroy E. Brophy, 3rd Floor Space, Month to Month

together also with any contracts made by said lessees to purchase from Building Power & Light

466 Corporation electric current consumed by such lessees in the premises leased by them; said trustee and said bankrupt assigning only such rights or interest as they, or either of them may have under such contracts.

State of New York,
County of New York—ss.:

On this 14th day of December, in the year nineteen hundred and thirty two, before me personally came Geo. J. Wise, to me known, who being by me duly sworn did depose and say that he resided in
467 White Plains, N. Y.; that he is one of the Vice-Presidents of the United Cigar Stores Company of America, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

ANN L. REILLY

468 ANN L. REILLY, Notary Public
N. Y. Co. Clk's No. 62, Reg. No. 4-R-396
Kings Co. Clk's No. 176, Reg. No. 4273
Bronx Co. Clk's No. 36, Reg. No. 138-R-34
My Commission expires March 30th, 1934
(Seal)

State of New York,
County of New York—ss.:

On this 13th day of December, in the year nineteen hundred and thirty two, before me personally came Joseph T. Stearns, to me known, who being by me duly sworn, did depose and say that he

resided in the State of New York; that he is 469
Assistant Secretary of the Irving Trust Company, the corporation described in and which executed the above instrument as Trustee in Bankruptcy; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

ALMA BERGER
ALMA BERGER 470
Notary Public, Queens County
Queens Co. Clk's No. 125, Reg. No. 185
Certificate filed in N. Y. County
N. Y. Co. Clk's No. 50, Reg. No. 4824
Commission Expires March 30, 1934
(Seal)

State of Illinois,
County of Cook—ss.:

I, MAX W. PETACQUE, a Notary Public, do hereby certify that Simon Lorch personally known to me to be the same person whose name is sub- 471
scribed to the foregoing instrument appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Official seal this 22nd day of November 1932.

MAX W. PETACQUE
Notary Public

(Seal)

Trustee's Exhibit 15, April 2, 1935.

(Marked in evidence at folio 900.)

472

Law Offices
PETACQUE & HARRISON
134 North LaSalle Street
Chicago

November 22, 1932

Irving Trust Company
625 Madison Avenue
New York, N. Y.

Gentlemen:—

In connection with the premises at the South East corner of Belmont and Lincoln Avenues
473 owned by our client, Simon Lorch, we enclose herewith executed by him the following:

1. Lease between Simon Lorch, as lessor, and United Cigar Stores, Inc., an Illinois corporation, as lessee, for the corner store in the building at the South East corner of Lincoln and Belmont Avenues, Chicago, Illinois, for the term commencing September 1, 1932 and expiring April 30, 1936, subject to cancellation at the option of the lessor on April 30, 1934, as therein more specifically set forth. As to this lease, we also call your attention to the fact that we have inserted the following
474 provision on page 2 of the lease. "Such assignee shall thereupon likewise become liable for the full performance of this lease."

2. In connection with this lease, Mr. Lorch is also asking for the execution of a form of contract with the Building Power & Light Corp., 431 S. Dearborn Street, Chicago, Illinois, for the purchase of electric current to be consumed in the demised premises. All other tenants in the building have a similar contract which was signed when the United Cigar Stores Company operated said premises. Form of such contract is enclosed herewith.

Trustee's Exhibit 15, April 2, 1935.

3. Assignment agreement to be entered into 475
between Simon Lorch, as landlord, United Cigar Stores Company of America, as bankrupt, and Irving Trust Company, as Trustee. We call your attention to the fact that we have made the following modifications in the form as submitted by your office:

(a) No charge is to be made by the trustee or the receiver for expenses in collecting rents from subtenants.

(b) Certain reservations are made in connection with Paragraph Fifth. These reservations have been previously discussed with you 476
and we believe that you will agree with us that such reservations are fairly asked for.

(c) A provision has been incorporated to the effect that the trustee and bankrupt assign the interest under electric current contracts above referred to.

4. Order proposed to be submitted to the Referee in Bankruptcy approving the assignment of leases to Simon Lorch, etc. While this order gives the trustee the right to execute such assignment in lieu of a rejection of the lease at the discretion of the trustee, it is of course understood 477
as a part of this entire transaction that the trustee is to secure the consent of the court to such assignment and is not to reject the lease.

We believe that the above requests are fair. May we take this opportunity of expressing our appreciation for the patience, diligence and cooperation of your Mr. Fyfe in endeavoring to work out the various questions that have come up from time to time regarding this matter.

We trust that the enclosures are in satisfactory

478 form and that the matter may be closed at an early date.

Very truly yours,

MAX W. PETACQUE (signed)

MWP:DU

Trustee's Exhibit 16, April 2, 1935.

(Marked in evidence at folio 900.)

Register No. 1123

Law Offices
479 PETACQUE & HARRISON
134 North LaSalle Street
Chicago

December 3, 1932.

Irving Trust Company
625 Madison Avenue
New York, New York

Gentlemen:—

Our client, Simon Lorch, who is the owner of the real estate at the South East corner of Lincoln and Belmont Avenues, Chicago, Illinois, (Lease No. 598) is in receipt of a notice as to the hearing
480 on December 8th, 1932 with reference to the above lease. With this notice a form has been enclosed whereby the landlord may ask for an assignment of the lease and sub-leases in lieu of rejection of the lease by the Trustee.

Your attention is called to the fact that under date of November 22, 1932, we delivered in behalf of our client, Mr. Lorch, to your Mr. Fyfe, as the representative here of the Irving Trust Company, various documents, all of which were executed by Simon Lorch, being the documents necessary in order to effect an assignment of the lease

and subleases instead of a rejection. We assume 481
that the notice of the hearing of December 8th was sent to Mr. Lorch as a matter of form and that the matter is being closed on the basis of the documents and instruments executed by Mr. Lorch and submitted to Mr. Fyfe.

Very truly yours,

MAX W. PETACQUE (signed)

MWP:DU

Trustee's Exhibit 17, April 2, 1935.

(Marked in evidence at folio 900.) 482

December 17, 1932

CWDjg
Mr. Simon Lorch,
318 West Adams St.,
Chicago, Ill.

Re: Store #598

Dear Sir:

We are enclosing herewith executed copy of Assignment Agreement dated October 19th, 1932, made between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Simon Lorch, and United Cigar Stores 483
Company of America, covering premises at the southeast corner of Belmont and Lincoln Avenues, Chicago, Illinois.

We are enclosing herewith the following lease and subleases:—

Lease dated December 20, 1928 made between Simon Lorch and United Cigar Stores Company of America.

Sublease dated April 10, 1930 made to Mark B. Solomon, together with three agreements under date of April 10, 1930 by and between

Trustee's Exhibit 17, April 2, 1935.

484 United Cigar Stores Company of America and Mark B. Solomon.

Sublease dated June 28, 1932 made to Joseph Berg.

Sublease dated February 17, 1932 made to Lakeview Radio Co. Inc., together with letter under date of February 17, 1932 to Lakeview Radio Co., Inc., from United Cigar Stores Company of America.

Sublease dated May 31, 1926 made to John R. Thompson Co.

Sublease dated January 22, 1932 made to
485 Nathan H. Rosen, together with amendment agreement dated 18th August, 1932 between United Cigar Stores Company of America and Nathan H. Rosen; also letter under date of January 22, 1932.

Sublease dated January 22nd, 1932 made to Charles H. Kaplan.

Sublease dated January 25, 1932 made to Oscar Sanders.

Kindly acknowledge receipt.

Very truly yours,

IRVING TRUST COMPANY,
486 as Trustee in Bankruptcy for United Cigar Stores Company of America,

by .....
E. PAUL PHILLIPS

Registered Mail
encl.

Claimant's Exhibit B for Identification, April 2, 1935 (Claim No. 5286).

(Marked for Identification at folio 908.)

UNITED CIGAR STORES COMPANY OF AMERICA

Annual Report to Stockholders

Year Ending December 31, 1931

UNITED CIGAR STORES COMPANY OF AMERICA

OFFICERS

GEORGE K. MORROW, *Chairman of the Board*
FREDERICK K. MORROW, *President*
R. W. JAMESON, *First Vice-President*

A. C. ALLEN, *Vice-President*
M. A. BOUVIER, *Vice-President*
H. J. MOFFETT, *Vice-President*
F. A. MURPHY, *Vice-President*
A. M. ROSENTHAL, *Vice-President*
SAMUEL SIMONS, *Vice-President*
R. L. THOMAS, *Vice-President*
GEORGE J. WISE, *Vice-President*
H. G. WOLFF, *Vice-President*
GEORGE WATTLEY, *Treasurer*
W. A. FERGUSON, *Secretary*

BOARD OF DIRECTORS

Term Expires 1932

W. A. BLACK
SIR HERBERT HOLT
THOMAS H. MCINNERNEY
H. HOBART PORTER
WALTER B. RYAN, JR.
EUGENE W. STETSON

Term Expires 1933

JOHN D. BURGER
RANDOLPH CATLIN
JOHN FOSTER DULLES
JAMES W. JAMESON
GEORGE M. MOFFETT
H. J. MOFFETT

Term Expires 1934

A. C. ALLEN
W. L. CUMMINGS
R. W. JAMESON
FREDERICK K. MORROW
GEORGE K. MORROW
ROBERT M. MCMULLEN

Claimant's Exhibit B for Identification, April 2, 1935 (Claim No. 5286).

UNITED CIGAR STORES COMPANY OF AMERICA
625 Madison Avenue
New York City

Annual Report to Stockholders
Year Ending December 31, 1931

May 9, 1932.

To the Stockholders of
UNITED CIGAR STORES COMPANY OF AMERICA

There is presented herewith the annual report of United Cigar Stores Company of America and its subsidiary companies for the year ending December 31, 1931, comprising the following statements with the report of Messrs. Price, Waterhouse & Co. thereon:

Consolidated Balance Sheet as at December 31, 1931;

Comparative Statement of Profit and Loss for the two years ending December 31, 1931;

Statement of Capital Surplus for the year ending December 31, 1931.

By order of the Board of Directors.

GEORGE K. MORROW,
Chairm

Claimant's Exhibit B for Identification,
April 2, 1935 (Claim No. 5286).

UNITED CIGAR STORES COMPANY OF AMERICA

and Subsidiary Companies

CONSOLIDATED BALANCE SHEET—DECEMBER 31, 1931

ASSETS

CURRENT ASSETS:		
Cash in banks, on hand and in transit		$ 3,814,915.78
Time deposit		1,000,000.00
Marketable securities at cost, below quoted market values		969,549.38
Notes receivable	$ 17,169.70	
Accounts receivable	2,046,430.81	
	$2,063,600.51	
Less—Reserve for bad debts	305,347.67	1,758,252.84
Inventories at cost, less contingent reserve for unsalable merchandise		10,984,739.35
		$18,527,457.35
INVESTMENTS AND ADVANCES:		
Securities of other companies at or below cost		$ 3,656,184.71
Advances to other companies		1,072,339.80
Mortgages receivable		1,355,505.78
Cash and securities (at cost) held for employees' pension fund		209,323.85
Debenture sinking fund cash and deposits for retirement of mortgages payable		63,673.71
		6,357,027.85
REAL ESTATE:		
Land and buildings owned in fee, as valued by company's appraisal in 1929, plus subsequent additions at or below cost		$33,664,660.45
Less—Reserves for depreciation of buildings		1,076,851.34
		$32,587,809.11
Improvements to leaseholds, less amortiza-		

LIABILITIES

CURRENT LIABILITIES:		
Notes payable	$138,354.23	
Accounts payable and sundry accruals	6,577,599.75	
Accrued interest on mortgages, debentures, etc.	392,806.60	
		$ 7,108,760.58
DEFERRED LIABILITIES AND RESERVES:		
Advance rentals and tenants' security deposits	$ 550,114.59	
Deferred discounts and participations of others in respect of mortgages receivable	107,915.74	
Reserve for building construction on a leasehold	156,253.31	
Reserve for employees' pension fund	209,323.85	
Reserve for contingencies	763,496.44	
Deferred income applicable to 1932 operations	700,758.64	
		2,487,862.57
MINORITY INTEREST IN COMMON STOCK OF WHELAN DRUG CO., INC. AT STATED VALUE		20.00
FUNDED AND MORTGAGE DEBT:		
Twenty-year 5½% sinking fund gold debentures of Cigar Stores Realty Holdings, Inc., due 1949:		
Issued	$10,000,000.00	
Less—Retired and in treasury	1,820,000.00	
Outstanding	$ 8,180,000.00	
NOTE—$385,000 par value of treasury debentures are deposited as security for a lease.		
Real estate mortgages	19,612,470.32	
		27,792,470.32
CAPITAL STOCK AND CAPITAL SURPLUS:		
Preferred stock 6% cumulative:		
Authorized 492,010 shares of $100 par value		
Issued 192,010 shares	$19,201,000.00	
Less 20,653 shares in treasury	2,065,300.00	
Outstanding 171,357 shares		17,135,700.00
NOTE—Cumulative preferred dividends unpaid		

Time deposit		1,000,000.00	
Marketable securities at cost, below quoted market values		969,549.38	
Notes receivable	$ 17,469.70		
Accounts receivable	2,046,430.81		
	$2,063,600.51		
Less—Reserve for bad debts	305,347.67	1,758,252.84	
Inventories at cost, less contingent reserve for unsalable merchandise		10,984,739.35	
			$18,527,457.35

INVESTMENTS AND ADVANCES:

Securities of other companies at or below cost		$ 3,656,184.71	
Advances to other companies		1,072,339.80	
Mortgages receivable		1,355,505.78	
Cash and securities (at cost) held for employees' pension fund		209,323.85	
Debenture sinking fund cash and deposits for retirement of mortgages payable		63,673.71	
			6,357,027.85

REAL ESTATE:

Land and buildings owned in fee, as valued by company's appraisal in 1929, plus subsequent additions at or below cost		$33,664,660.45	
Less—Reserves for depreciation of buildings		1,076,851.34	
		$32,587,809.11	
Improvements to leaseholds, less amortization		6,335,128.99	
Store improvements and building construction in progress		263,434.57	
			39,186,372.67
FURNITURE, FIXTURES AND EQUIPMENT		$ 7,458,843.25	
Less—Reserve for depreciation		2,998,164.56	
			4,460,678.69

DEFERRED CHARGES:

Prepaid insurance, taxes, etc.		$ 372,639.65	
Stationery and supplies		85,884.70	
Rents paid in advance		244,879.15	
Unamortized lease bonuses and commis-			

etc.		392,806.60	
			$ 7,108,760.58

DEFERRED LIABILITIES AND RESERVES:

Advance rentals and tenants' security deposits		$ 550,114.59	
Deferred discounts and participations of others in respect of mortgages receivable		107,915.74	
Reserve for building construction on a leasehold		156,253.31	
Reserve for employees' pension fund		209,323.85	
Reserve for contingencies		763,496.44	
Deferred income applicable to 1932 operations		700,758.64	
			2,487,862.57

MINORITY INTEREST IN COMMON STOCK OF WHELAN DRUG CO., INC. AT STATED VALUE 20.00

FUNDED AND MORTGAGE DEBT:

Twenty-year 5½% sinking fund gold debentures of Cigar Stores Realty Holdings, Inc., due 1949:			
Issued		$10,000,000.00	
Less—Retired and in treasury		1,820,000.00	
Outstanding		$ 8,180,000.00	

NOTE—$335,000 par value of treasury debentures are deposited as security for a lease.

Real estate mortgages		19,612,470.32	
			27,792,470.32

CAPITAL STOCK AND CAPITAL SURPLUS:

Preferred stock 6% cumulative:			
Authorized	492,010 shares of $100 par value		
Issued	192,010 shares	$19,201,000.00	
Less	20,653 shares in treasury	2,065,300.00	
Outstanding	171,357 shares		17,135,700.00

NOTE—Cumulative preferred dividends unpaid December 31, 1931—7½%.

Common stock:			
Authorized	6,000,000 shares without par value		
Issued	5,422,804.437 shares	$ 5,422,804.44	
Less	53,143.5 shares in treasury	53,143.50	
Outstanding	5,369,660.937 shares	$ 5,369,660.94	

NOTES—Common stock was changed to $1 par value on February 23, 1932.

—As part of their compensation the company's principal officers have been granted options running to 1936 to purchase an aggregate of 320,000 shares of common stock at $1 per share. Such options are exercisable during 1932 only to the extent of 208,000 shares.

DEFERRED CHARGES:-		
Prepaid insurance, taxes, etc.	$ 372,639.65	
Stationery and supplies	85,884.70	
Rents paid in advance	244,879.15	
Unamortized lease bonuses and commissions	754,873.57	
Unamortized discount on funded and mortgage debt	614,920.52	
		2,073,197.59
GOODWILL AND LEASEHOLDS		1.00
		870,604,735.15

Capital surplus, per statement attached	9,206,331.04	
		14,575,994.98
SURPLUS:		
Balance December 31, 1930, per published report for that year	$ 1,215,666.41	
Profit for the year ending December 31, 1931, per statement attached	288,260.29	
		1,503,926.70
		870,604,735.15

NOTES—Common stock was changed to $1 par value on February 23, 1932.

—As part of their compensation the company's principal officers have been granted options running to 1936 to purchase an aggregate of 320,000 shares of common stock at $1 per share. Such options are exercisable during 1932 only to the extent of 208,000 shares.

To the Stockholders of United Cigar Stores Company of America:

We have made an examination of the books and accounts of United Cigar Stores Company of America and its subsidiary companies for the year ending December 31, 1931 and we report that, in our opinion, the above consolidated balance sheet and the attached statements of profit and loss and capital surplus fairly set forth the financial position of the company at December 31, 1931 and the results of operations for the year.

56 Pine Street, New York
May 2, 1932.

PRICE, WATERHOUSE & CO.

Claimant's Exhibit B for Identification, April 2, 1935 (Claim No. 5286).

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UNITED CIGAR STORES COMPANY OF AMERICA
and Subsidiary Companies

COMPARATIVE STATEMENTS OF PROFIT AND LOSS
FOR THE TWO YEARS ENDING DECEMBER 31, 1931
(With Statement of Store Operations for 1929)

	1929	1930	1931
Store operations:			
Sales	$84,678,557.63	$91,862,872.27	$82,486,019.95
Cost of sales, store operating, administrative and general expenses	$85,261,873.69	$91,430,193.41	$81,672,620.50
97 Depreciation and amortization	840,808.25	846,213.24	846,096.68
	$86,102,681.94	$92,276,406.65	$82,518,717.18
Result of store operations, *loss*	*$ 1,424,124.31*	*$ 413,534.38*	*$ 32,697.23*
Real estate operations:			
Rent and other gross income		$13,653,281.33	$13,119,534.88
Net profit, *loss*, on sale of real estate, leaseholds and mortgages		620,897.86	*56,094.08*
Discount on 5½% debentures purchased		134,430.25	127,200.00
98		$14,408,609.44	$13,190,640.80
Rents paid, operating and general expenses		$11,041,139.88	$11,728,791.86
Depreciation and amortization		704,397.11	713,832.70
Interest on real estate mortgages		976,234.23	1,013,600.15
Interest and amortization of discount on 5½% debentures		535,645.44	490,791.73
Other interest paid		70,639.17	42,114.36
		$13,328,055.83	$13,989,130.80
Result of real estate operations, profit, *loss*		$ 1,080,553.61	*$ 798,490.00*

Claimant's Exhibit B for Identification, April 2, 1935 (Claim No. 5286).

Other income and credits:

Interest and dividends received	$ 831,313.33	$ 477,917.60
Reserve for redemption of premium certificates written back on termination of redemption privilege		585,384.83
Adjustment of other reserves no longer required	53,647.45	56,145.09
Total other income and credits	$ 884,960.78	$ 1,119,447.52
Net result	$ 1,551,980.01	$ 288,260.29

NOTE—No Federal income tax is payable for 1930 or 1931 inasmuch as allowable deductions exceed the taxable income.

UNITED CIGAR STORES COMPANY OF AMERICA
and Subsidiary Companies

STATEMENT OF CAPITAL SURPLUS
FOR THE YEAR ENDING DECEMBER 31, 1931

Capital surplus at December 31, 1930 per published report for that year		$11,347,144.65
Add—Capital surplus in respect of treasury common stock issued during the year		165,000.00
		$11,512,144.65
Deduct:		
Reduction of investment in an associated real estate company to the value of real estate and other assets received in liquidation as appraised by the company's staff	$1,542,405.51	
Loss on sales of real estate based on company's appraised values	292,907.83	
Mortgage receivable determined to be uncollectible and written off	247,666.67	
Loss on sales of miscellaneous securities of other companies	222,830.60	
		2,305,810.61
Capital surplus at December 31, 1931, per balance sheet		$ 9,206,334.04

Claimant's Exhibit C, April 2, 1935 (Claim No. 5286).

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(Marked in evidence at folio 917.)

November 5, 1932.

Mr. Simon Lorch,
316 West Adams Street,
Chicago, Illinois.

Dear Sir:—

Enclosed herewith is check in the amount of $3,653.50 to cover the following:

(a) $1,000.00 of such sum is to cover Trustee's use and occupancy of the cigar store in the premises located at 1547-53 Belmont Avenue, Chicago,
503 Illinois at the agreed upon rate of $500.00 per month for the months of September and October, 1932.

(b) The balance of $2,653.50 is to cover moneys collected by us during the months of September and October, 1932, from the subtenants occupying the remainder of said premises located at 1547-53 Belmont Avenue, Chicago, Illinois.

This check may be accepted by you without prejudice to any claim you may have against the estate of United Cigar Stores Company of America, Bankrupt, and/or the Trustee for said Bank-
504 rupt, and this check is given to you by us and accepted by you without prejudice to any right we as Trustee may have to affirm or disaffirm the lease covering said premises dated December 20, 1928 and entered into between you as Lessor and the United Cigar Stores Company of America, as Lessee.

An agreement with respect to the continuation of occupancy of the cigar store by the Trustee and of the management by the Trustee of the remainder of aforementioned premises is being prepared by Mr. Faust in cooperation with your

attorney, Mr. Petacque, and will be submitted to 505
New York for approval.

Very truly yours,

IRVING TRUST COMPANY, Trustee
United Cigar Stores Company of
America, Bankrupt.
By (signed) WALTER A. FYFE.

WAF*ISK

Proof of Claim of J. E. Nunn (No. 5421).

UNITED STATES DISTRICT COURT, 506

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

At Amarillo, in the County of Potter, State of Texas, in the Amarillo Division of the United States District Court for the Northern District of Texas, on the date hereinafter set forth, came J. E. Nunn, and makes oath and says:

1. I am the claimant herein.

2. I heretofore duly filed in the United States 507
District Court, Southern District of New York, in the matter of United Cigar Stores Company of America, bankrupt, a proof of claim duly verified by me on January 24, 1933, to which proof of claim and the exhibits thereto annexed I now refer and make a part hereof with the same force and effect as though the same were hereto physically annexed.

3. In proceedings subsequently had in said bankruptcy, Hon. Irwin Kurtz, Referee in Bank-

ruptcy, made an order on January 24, 1934, allowing my said claim in the sum of $2958.24. This sum of $2958.24 included the items of debt in the aforementioned proof of claim which accrued prior to August 29, 1932, the date of filing of the petition in bankruptcy in said bankruptcy proceedings, and which constituted provable debts under the then state of the bankruptcy law. I have been informed by my attorneys that the balance of my said proof of claim was not allowed for the reason that said balance was based upon future rent which was not provable in the said bankruptcy proceedings.

4. On account of said allowed claim of $2958.24 I have received the sum of $2407.09, of which $1857.09 was in cash and the balance of $550.00 in the form of an offset arising by reason of a certain indebtedness of mine to the Trustee.

5. The Trustee in said bankruptcy proceedings was authorized by the aforementioned Referee in Bankruptcy to reject the lease mentioned in my said proof of claim; said Trustee did so reject said lease, and by an agreement dated November 22, 1932, assigned and surrendered said lease to me as of September 1, 1932, and pursuant thereto I re-entered the premises affected by said lease. Said agreement contained a proviso wherein and whereby I reserved all my rights as landlord to prove any claim I might have against the bankrupt estate and was without prejudice or without waiver to rentals due under said lease.

6. A copy of the aforementioned lease is attached hereto and marked Exhibit A.

7. By reason of said rejection and/or sur-

render of said unexpired lease of real estate, I 511
have suffered severe injury and damage as follows:

1. The debtor has paid none of the monthly instalments of rent which have or would have accrued under said lease since August 30, 1932, to the date hereof. There have accrued in that period twenty-six monthly instalments of rent, amounting in the whole to $39,000 which is unpaid.

2. The debtor has failed to pay the taxes for 1933 and 1934 amounting to $4824.10, which taxes it was obligated to pay under 512
the terms of said lease.

3. The debtor has failed to pay the cost of maintenance and operation of said premises, which it was obligated to do under said lease, for the years 1933 and 1934, and which average annual cost has been $2940.00.

8. Despite diligent effort on my part, I have been unable to relet the premises affected by said lease, or any part or parts thereof, for a sum or sums sufficient to equal the above-mentioned damage, and since August 30, 1932 I have only obtained from rentals of said premises the sum of 513
$1010.00 per month. My net damage, exclusive of counsel fees and other incidental expense, to the date hereof is $23,444.10.

9. I verily believe that I will be unable, at any time prior to September 30, 1947, to rent the said premises so as to receive rentals at a greater rate than I have received since August 30, 1932, to wit, a monthly average rental of $1010.00.

10. By reason of said rejection and/or surrender of said unexpired lease of real estate, I will

514 continue to suffer severe injury and damage as follows:

1. On the 1st of every month from the date hereof, commencing November 1, 1934, the monthly rent of $1500.00 under said lease will accrue and to the best of my knowledge and belief I will actually receive for rentals from said premises no more than the monthly average of $1010.00 mentioned in paragraph 9, to my net monthly damage of $490.00.

515 2. The taxes and cost of maintenance and operation will not be paid by the debtor for the year 1935 and each year thereafter until the expiration of said lease. I believe that said taxes will average the annual sum of $2412.10, and said cost the annual sum of $2940.00.

11. I have received no payments on account of any of my claims against the above-named debtor except as herein mentioned, and have received no security except a future interest in certain personal property which was assigned to me by the Trustee
516 in connection with that portion of my claim which was heretofore provable in the bankruptcy proceedings. I have received no security whatsoever for the portions of my claim herein again set forth at length and arising after August 30, 1932 under said unexpired lease of real estate, to wit, I have received no security for my claim for future rent which was not provable in said bankruptcy proceedings.

12. By way of recapitulation, my damage under said lease for the three years next succeeding Sep-

tember 1, 1932, the effective date of the Trustee's surrender of said premises, is as follows: 517

1. 36 months rent at $150.00	$ 54,000.00
2. 1933 and 1934 taxes	4,824.25
3. 3 years cost of maintenance and operation—estimated	8,820.00
4. 1935 taxes—estimated	2,412.10
Total	$70,056.35
Credit for 36 months rentals now being received at average of $1010.00 per month	36,360.00 518
Net damage for 3 years	$33,696.35

13. In setting forth the above-mentioned three year period, I do not waive any claim I may have for future rents against the debtor which may at any time accrue up to September 30, 1947, and a schedule of which is hereto annexed, made a part hereof and marked Exhibit B.

WHEREFORE, I respectfully submit this claim for future rent in the above-entitled reorganization proceedings and pray that my said claim be allowed and paid. 519

J. E. NUNN.

(County Clerk's Certificate annexed, acknowledged before notary.)

EXHIBIT A.

(Copy of Lease.)

Attached to proof of claim is original lease between debtor and claimant. Lease is partially in

520 the form of the lease printed in Claim No. 5304 (pp. 67-67*o*). Lease differs principally in that it is subject to stated leases and tenancies. The forfeiture clause is the same as in Claim No. 5304.

EXHIBIT B.

Schedule of total damage which has arisen and will arise by reason of said rejection and/or surrender of said unexpired lease of real estate.

	Total fixed rent for entire term which has not been		
521	paid by debtor	$271,500.00	
	Total taxes, insurance, assessments, water rents or rates and other payments for entire term which has not been paid by the debtor	80,281.50	
	Total lease obligations which have not been paid by the debtor		$351,781.50
	Less:		
522	Fair rental value of leased premises from September 1, 1932—date of rejection of lease—to end of term	$182,810.00	
			$182,810.00
	Total amount claimed for entire term of original lease		$168,971.50

(No credit is given for any amounts paid in the bankruptcy proceedings for the reason that any

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amounts so received, as set forth in the foregoing proof of claim, were received on account of indebtedness accruing before September 1, 1932, the date of rejection. On account of my allowed claims for items accruing prior to the bankruptcy, I have been paid in full by the Trustee except for an unpaid balance of $551.25.)

Statement of Trustee's Objection to Claim of J. E. Nunn (No. 5421).

524 The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of J. E. Nunn (No. 5421) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5421 by J. E. Nunn (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $33,696.35. Your petitioner objects to the allowance of said claim for the following reasons:

525 The Trustee objects to the allowance of this claim for the reason that the lease upon which the claim is based was never rejected by the Trustee in Bankruptcy. Moreover, by agreement dated November 22, 1932 the Trustee and the Debtor assigned to the claimant their respective right, title, and interest in and to said lease, and in connection therewith the claimant expressly assumed all existing and future obligations required under said lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder.

Trustee's Exhibit 18, April 2, 1935.

(Marked in evidence at folio 936.)

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ASSIGNMENT AGREEMENT

ASSIGNMENT AGREEMENT, made this 22nd day of November, 1932 between Irving Trust Company, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of United Cigar Stores Company of America (hereinafter sometimes called the Trustee), party of the first part, J. E. NUNN of Nunn Building, Amarillo, Texas (hereinafter called the Landlord), party of the second part and United Cigar Stores Company of America, of No. 625 Madison Ave., New York City, a cor-
527 poration organized under the laws of the State of New Jersey (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated August 30, 1927 (hereinafter called the Lease), covering certain premises: All of lots Nos. 11, 12 and 13 in Block 52, of the Glidden and Sanborn Addition to the City of Amarillo, Potter County, Texas, being the premises situated at the northeast corner of Fifth Street and Polk Street, Amarillo,
528 Texas, together with the two-story brick building now located thereon, being known as the Nunn Building, said premises having a frontage of 90′ on Polk Street and 140′ on Fifth Street; (hereinafter called the Premises), for a term commencing October 1, 1927 and expiring September 30, 1947.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated

Trustee's Exhibit 18, April 2, 1935.

bankrupt and Irving Trust Company was ap- 529
pointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 11, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such as- 530
signment.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to J. E. Nunn any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

SECOND: The Bankrupt hereby assigns to J. E. 531
Nunn any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by

532 it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court
533 costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity
534 as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate

agreement with the Landlord), and covenants and 535
agrees to exonerate, indemnity and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby 536
assigned, or the Premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

RIDER ATTACHED HEREAT.

Nothing in this ARTICLE 5 shall be deemed a waiver by the Landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord from 537
the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. J. T. S.

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease

538 or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
As Trustee in Bankruptcy for United
Cigar Stores Company of America,
539 By JOSEPH T. STEARNS
Assistant Secretary
J. E. NUNN
Landlord

Witness:
LOUISE BEATTIE
MARGARET J. CRAWFORD

UNITED CIGAR STORES COMPANY
OF AMERICA,
By H. G. WOLFF
Vice-President.

540

SCHEDULE OF SUBLEASES:

State of Illinois, County of Cook—8th day of December, 1932—H. G. Wolff—acknowledged before William H. Weiss, Notary Public.

State of New York, County of N. Y.—15th day of December—1932, Joseph T. Stearns—acknowledged before Alma Berger, Notary Public.

State of Texas, County of Potter—7th day of December, 1932—J. E. Nunn—acknowledged before H. M. Adkins, Notary Public.

Trustee's Exhibit 19, April 2, 1935.

(Marked in evidence at folio 986.)

541

Dec. 19, 1932.

Lease No. 3507

Mr. J. E. Nunn,
Nunn Building,
Amarillo, Texas.

Re: Premises Northeast corner Fifth — Polk Sts.,
Amarillo, Texas.

Dear Sir:

We enclose herewith the following executed documents, covering the above premises.

Assignment agreement dated Nov. 22nd, 1932 542
between Irving Trust Company as Trustee in Bankruptcy of United Cigar Stores Company of America, as Trustee in Bankruptcy of United Cigar Stores Company of America, J. E. Nunn and United Cigar Stores Company of America.

Lease dated August 30th, 1927 between J. E. Nunn and United Cigar Stores Company of America.

Sublease dated June 1929 to Postal Telegraph-Cable Company.
" " Jan. 24th, 1928 to the Nunn-Electric Company. 543
" " May 1932 to A. Ross Richardson.
" " May 6th, 1932 to T. G. Crossett and B. R. Polley.
" " Nov. 26th, 1929 to Grant E. Combes, modification agreement.
" " Jan. 22nd, 1932 to R. B. Lathan, P. F. Yocham and J. B. Latham.
" " July 24th, 1929 to J. D. Robinson.
" " Dec. 29th, 1928 to O. D. Thompson.
" " Mar. 11th, 1932 to J. Lindsey Nunn.

Statement of Contents of Proof of Claim of Herbert Livingston et al. (No. 5406).

544

Kindly acknowledge receipt of the above.

Yours very truly,

IRVING TRUST COMPANY, as
Trustee in Bankruptcy,
By E. PAUL PHILLIPS.

Encl.
Reg.
CWD:ER

Registered Return Receipt attached to original.

545

Statement of Contents of Proof of Claim of Herbert Livingston et al. (No. 5406).

The following is a statement of the contents of the proof of claim of Herbert Livingston, et al., as trustees of Maik Livingston Estate, filed in the within reorganization proceedings.

The claimants are trustees of the estate of Maik Livingston and are authorized to execute the proof of claim.

The claimants are the owners of a claim against the debtor based upon or arising out of the lease
546 dated June 22, 1923, between claimants and the debtor for a term commencing prior to August 29, 1932 and ending on March 28, 1941, or for injury resulting from the rejection of said lease by the trustee in bankruptcy on or about December 3, 1932, or for damages or indemnity under a covenant or covenants contained in said lease. The trustee in bankruptcy surrendered the premises covered by said lease on or about December 3, 1932, and the landlord re-entered said premises on December 3, 1932. Except as shown in the proof of claim, neither the debtor nor the trustee in bankruptcy paid the rent or

Statement of Contents of Proof of Claim of Herbert Livingston et al. (No. 5406).

547

other obligations accruing under said lease after the 31st day of August, 1932. The claimant, Sigmund Livingston, acquired the interest of Herbert Livingston on November 1, 1933.

The claimants compute the amounts owing to them on the date of the approval of the petition for reorganization as follows:

> The total lease obligations which have not been paid by the debtor amount to $64,484 and consist of the fixed rent for the entire term not paid by the debtor, plus total taxes, insurance, assessments and other payments required to be made by the debtor for the entire term which have not been paid in the sum of $12,984. There is deducted from this total lease obligation the sum of $39,916.62, which consists of the fair rental value of the leased premises from the date of rejection of the lease to the end of the term and such amounts as were paid by the trustee in bankruptcy for use and occupation of the premises by such trustee. The total amount claimed for the entire term of the original lease is, therefore, $24,577.38.

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The total amount of the claim allowable under Section 77B on a parity with debts which would be provable under Section 63(a) amounts to $24,047.76. This sum is made up of the total lease obligations accrued up to the date of surrender of the premises or date of re-entry by the landlord, whichever first occurred, in the sum of $3,131.75, which sum is made up of the net or fixed rent accrued up to the date of surrender or re-entry ($1500), plus taxes, assessments, insurance and other payments accrued up to the

Statement of Contents of Proof of Claim of Herbert Livingston et al. (No. 5406).

550 date of surrender or re-entry ($1631.75). From the said total lease obligations aforementioned ($3131.75) there is deducted the sum of $1308.50, being the amounts paid by the trustee in bankruptcy for use and occupafion of the premises by the said trustee. The total unpaid lease obligations accrued up to the date of surrender or re-entry, whichever first occurred, amount, therefore, to $1823.25. To this sum is added the total lease obligations for the three year period, or for the entire balance of the term, if less than three years, amounting to $22,224.51. This latter
551 amount is made up of the net or fixed rent reserved in the lease without acceleration for the three year period next succeeding the date of surrender or re-entry, whichever first occurred ($18,000), plus taxes, assessments, insurance and other payments for the three year period ($4,224.51).

Paragraph V is the same as paragraph V printed in Claim No. 5304 (p. 64).

No part of the claim has been paid. The claimant has not received any security for the said debt. No judgment has been rendered there-
552 for, but a claim based on said lease was filed in said bankruptcy proceeding and was not allowed. The proof of claim is executed by Herbert Livingston and Sigmund Livingston before a notary public on October 8, 1934.

The claimants appoint Solomon E. Harrison and Benjamin I. Morris their attorneys to act for them in the reorganization proceedings.

Attached to the proof of claim is the original lease between the debtor and claimant substantially in the form of the lease printed in Claim No. 5304 (pp. 67-67*o*), including a similar forfeiture clause.

Statement of Trustee's Objection to Claim of Herbert Livingston et al. (No. 5406). 553

The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of Herbert Livingston et al. (No. 5406) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5406 by Herbert Livingston and Sigmund Livingston, individually and as Trustee of Maik Livingston Estate (hereinafter 554 called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $24,567.38 with int. Your petitioner objects to the allowance of said claim for the following reasons:

The Trustee objects to the allowance of this claim for the reason that by agreement dated November 30, 1932 the Debtor assigned to the claimants all its right, title, and interest in and to the lease upon which this claim is based, and by said agreement all existing and future obligations required under said lease to be performed 555 by the Debtor were expressly assumed by the claimants who, thereby, in effect, accepted a surrender of the lease and terminated all obligations of the Debtor thereunder.

Trustee's Exhibit 20, April 2, 1935.

556 ASSIGNMENT AGREEMENT, made this 30th day of November, 1932, between IRVING TRUST COMPANY, of No. 625 Madison Avenue., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes call the Trustee), party of the first part, HERBERT LIVINGSTON, SIGMUND LIVINGSTON, Manager of Michael Livingston Estate, of Bloomington, Illinois, (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter
557 somtimes called the Bankrupt, party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated June 22, 1923 (hereinafter called the Lease), covering certain premises: the three story and basement brick building, located at the northwest corner of the intersection of Washington and Center Streets, in the City of Bloomington, Illinois; being about 22′ front on Center Street and running back on Washington Street about 115′ to the
558 alley; (hereinafter called the Premises), for a term commencing January 1, 1925 and expiring March 28, 1931.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company

Trustee's Exhibit 20, April 2, 1935.

was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified. 559

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 14, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease. Pursuant to said order the Trustee rejected the Lease on 1932, the Landlord not having theretofore requested such assignment. 560

5. The Landlord, the Bankrupt and Trustee have entered into an agreement with respect to the matters hereinafter set forth.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Bankrupt hereby assigns to Herbert Livingston and Sigmund Livingston any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue, from and after December 1, 1932, under said agreements of sublease. 561

SECOND: The Trustee agrees to pay to the Landlord within ten (10) days from the execu-

562 tion and delivery of these presents, the sum of Fifteen Hundred ($1500.00) Dollars less Three Hundred Nineteen ($319.00) Dollars or a net balance of Eleven Hundred Eighty-one ($1181.00) Dollars, said Fifteen Hundred ($1500.) Dollar item being computed as rent due under the lease at the rate of Five hundred ($500.00) Dollars per month for the months of September, October and November. The deduction of Three Hundred Nineteen ($319.00) Dollars is made up of the items of rents uncollected from sub-tenants, which are expressly assigned to the Landlord, namely,
563 Fred B. Bowen, October rent and November rent $90.00; Gordon C. Ingersoll November rent $30.00; Emil A. Lemmie, October rent and November rent $60.00; Thomas E. Noonan, October rent and November rent $57.00; Thomas V. Watson, October rent and November rent $82.00; total $319.00. Said amount due from each of said sub-tenants is hereby assigned to said Landlord and said Landlord is given full power and authority to collect the same from said sub-tenants.

THIRD: The Landlord hereby assumes and agrees to perform all future obligations, terms and conditions required under the provisions of
564 the lease and under the provisions of any and all of said agreements of subleases to be performed on the part of the Bankrupt.

FOURTH: The Landlord hereby releases Irving Trust Company, individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from all future obligations on and from December 1, 1932 under said lease and subleases, with respect to the Premises, including all future rent, or the

use and occupation, if any, of the Premises, and 565
covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all rents to accrue hereafter under the said lease and also from any obligations or agreements of sublease. It is, however, expressly understood and agreed that the said Landlord does not waive any right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord 566
is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. All such provable claims shall not be affected by this agreement.

FIFTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either 567
individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America with respect to the Lease or any agreement of sublease hereby assigned and has not assumed and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise. The Landlord and the Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not affect in any manner the full force and validity of the rejection of the Lease by the Trustee.

Trustee's Exhibit 20, April 2, 1935.

568 It is, however, expressly understood that the sub-tenants, Fred B. Bowen does owe and has not paid the rent for October and November and that the amount due from him under the sublease is $90.00; and that Gordon C. Ingersoll, sub-tenant, has not paid the November rent and that the amount due under his sublease is $30.00; and that Emil A. Lemme has not paid the October and November rent and that the amount due from him under the sublease is $60.00; and that Thomas E. Noonan, a sub-tenant, has not paid the October and November rent and that the amount due
569 under the sublease from him is $57.00; and that Thomas V. Watson, a sub-tenant, has not paid the October and November rent and that the amount due from him under his sublease is $82.00.

IN WITNESS WHEREOF, the parties hereto have executed this Assignment Agreement, or caused the same to be executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United Cigar Stores Company of America,
By JOSEPH T. STEARNS.

570 HERBERT M. LIVINGSTON,
Individually.

SIG LIVINGSTON,
Manager of Michael Livingston Estate.

UNITED CIGAR STORES COMPANY OF AMERICA,
By H. G. WOLFF,
Vice President.

Trustee's Exhibit 21, April 2, 1935.

IRVING TRUST COMPANY 571

Trustee in Bankruptcy

—for—

UNITED CIGAR STORES COMPANY OF AMERICA
625 Madison Avenue
New York, N. Y.

December 29, 1932.

Herbert Livingston and Sigmund Livingston,
Managers of Michael Livingston Estate,
Bloomington, Illinois.

572

Gentlemen:

Re: Store No. 1208

We are enclosing herewith executed copy of Assignment Agreement dated November 30, 1932 made between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Herbert Livingston and Sigmund Livingston, Managers of Michael Livingston Estate, and United Cigar Stores Company of America, covering premises located at the N/W corner of Washington and Center Streets, Bloomington, Illinois. 573

We are also enclosing herewith the following lease and subleases:

Lease dated June 22, 1923 made between Abe Livingston, Executor of Samuel Livingston, deceased, Sigmund Livingston, Trustees of Michael Livingston Estate, together with amendment agreement dated December 22, 1930.

Sublease dated February 3, 1931 made to Mike Curtis.

Trustee's Exhibit 21, April 2, 1935.

574 Sublease dated August 14, 1929 made to Gordon C. Ingersoll, together with letters dated January 28, 1931.

Sublease dated March 12, 1931 made to David Press.

Sublease dated January 27, 1931 made to Thomas V. Watson, together with letters dated January 27, 1931.

Sublease dated August 8, 1931 made to Anna C. Janda.

Sublease dated February 3, 1931 made to Arthur P. Kane.

575 Sublease dated January 27, 1931 made to Emil A. Lemme.

Sublease dated September 15, 1931 made to Thomas E. Noonan.

Sublease dated January 28, 1931 made to Fred B. Bowen.

Kindly acknowledge receipt.

Very truly yours,

IRVING TRUST COMPANY,
Trustee in Bankruptcy of United Cigar Stores Company of America,
By E. PAUL PHILLIPS (signed)

576 "Received these documents this 13th January, 1933.
S. LIVINGSTON (signed)"
Registered Mail
encl.

Statement of Contents of Proof of Claim of Thomas H. Brown, et al. (Claim No. 5341).

577

The following is a statement of the contents of the proof of claim of Thomas H. Brown, et al., Trustees of Atherton Thayer Brown Association, filed in the within reorganization proceedings.

The Claimants are Trustees of Atherton Thayer Brown Association.

The Claimants are the owners of a claim against the Debtor based upon or arising out of the lease dated January 8, 1925, between Thomas Hassall Brown, et al., as Trustees and the Debtor, for a term commencing prior to August 29, 1932 and ending on January 31, 1940, or for injury resulting from the rejection of said lease by the Trustee 578
in Bankruptcy on or about November 3rd, 1932, or for damages or indemnity under a covenant or covenants contained in said lease.

The Trustee in Bankruptcy surrendered the premises covered by said lease on November 10th, 1932. Except as shown in the proof of claim, neither the Debtor nor the Trustee in Bankruptcy paid the rent or other obligations accruing under said lease after the 1st day of August, 1932.

The Claimants compute the amount owing to them under date of the approval of the petition for reorganization as follows: 579

> The total lease obligations which have not been paid by the Debtor amount to $247,928.82 and consist of the fixed rent for the entire term not paid by the Debtor ($240,000.) plus total taxes, insurance and other payments to be made by the Debtor ($7,928.82). There is deducted from this total lease obligation, the sum of $144,011.72, which consists of the fair rental value of the leased premises from the date of rejection of the lease to the end of the term ($139,700.79), in addition to

Statement of Contents of Proof of Claim of Thomas H. Brown, et al. (Claim No. 5341).

580 payments paid by the Trustee in Bankruptcy for use and occupation of premises by such Trustee ($1,339.27), and amounts paid by sub-tenants of Debtor to Landlord under original lease for occupancy up to date of rejection of lease ($2,971.66). The total amount claimed for the entire term of the original lease is therefore $103,917.10.

The total amount of the claim allowable under Section 77B on a parity with debts which would be provable under Section 63 (a) of the Bank-
581 ruptcy Act, amounts to $103,005.39.

This sum is made up by adding the unpaid obligations accrued up to date of surrender or re-entry, whichever first occurred ($5,056.27) to the total lease obligations for the three year period or for the entire balance of the term if less than three years ($97,949.12).

The total lease obligations ($9,367.20) mentioned above consists of the fixed rent accrued up to the date of surrender or re-entry ($8,000) plus taxes, assessment, and other payment accrued up to date of surrender or re-entry ($1,367.20).

582 The unpaid lease obligations accrued up to date of surrender or re-entry consists of the amount paid by the Trustee in Bankruptcy for use and occupation ($1339.27) plus the amounts paid by sub-tenants of the Debtor ($2,971.66), amounting together to $4,310.93, which latter sum subtracted from the total lease obligations ($9,367.20) results in $5,956.27.

The total lease obligations for the three year period are made up of the net or fixed rent reserved in the lease without acceleration for the three year period ($96,000) plus taxes, assessments, insurance and other payment over the three year period ($1,949.12), which sum added together

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make up the total lease obligations for the three year period.

The paragraph V is the same as paragraph V printed in Claim No. 5304 (p. 64).

No part of the claim has been paid; there are no set-offs or counterclaims; claimants have not received any further security for said debt; no judgment has been rendered therefor; a claim based on the said lease was filed in said bankruptcy proceeding and was not allowed.

The proof of claim is signed by Percy Loring, as agent of the Claimants before a Notary Public on October 6, 1934. 584

Claimants appoint Solomon E. Harrison, their attorney to act for them in the reorganization proceeding.

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

THIS INDENTURE made this 8th day of January, 1925, by and between THOMAS HASSALL BROWN and DAVENPORT BROWN, as they are Trustees of Atherton Thayer Brown Association under an Agreement and Declaration of Trust dated 585 September 25, 1914, and recorded with Suffolk Deeds, Book 3835, Page 403, hereinafter called the Lessors, (which expression shall include their heirs, assigns and successors in trust where the context so admits), Parties of the First Part, and UNITED CIGAR STORES COMPANY OF AMERICA, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the Lessee (which expression shall include its successors and assigns where the context so admits) Party of the Second Part; WITNESSETH:

In consideration of the rent and covenants

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 53⅓1).

586 herein reserved and contained on the part of the Lessee to be paid, performed and observed, the Lessors do hereby DEMISE and LEASE unto the Lessee the ground floor store premises and the basement under the same, in the building known as the Brown Building situated on the corner of Atlantic Avenue and Summer Street in Boston, Massachusetts, and numbered 185 on said Summer Street; such store premises shall include the mezzanine therein, and this demise shall include a right of way and means of access, ingress and
587 egress to and from such mezzanine through the Atlantic Avenue entrance to the building, which entrance shall be kept open at all times by the Lessors, and the Lessee to have the right to place business signs in and upon such entrance; excepting and reserving, however, to the Lessors, their heirs, assigns and successors in trust the elevator machinery, the steam heating boiler, the oil storage equipment, the rooms in the basement where the elevator machinery and steam boiler are installed, and all water meters, electric meters, gas meters, pipes, wiring, machinery and other appliances serving other parts of the Brown Build-
588 ing and now located on the premises above described, together with the right to maintain and operate the said elevator machinery, heating plant, oil storage, meters, pipes, wiring, machinery and appliances as now located, to install, maintain and operate substitutes therefor occupying the same or substantially the same space, to relocate, reconstruct, and alter at pleasure all steam-pipes on the demised premises, whether included in or serving the demised premises or not, and to enter upon and to pass and repass through the above described premises (or by such convenient routes and passageways as the Lessee may designate or provide)

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

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either personally or by their agents, servants or employes for all purposes that may be convenient or necessary in connection with the inspection, repair, maintenance, relocation, reconstruction, alteration, replacement or operation of the said building or of the said elevator machinery, heating plant, oil storage, steam pipes, meter pipes, wiring, machinery and appliances above reserved.

TO HAVE AND TO HOLD the premises hereby demised for the term of fifteen (15) years and one month, beginning with the first day of January, 1925 and ending with the thirty-first day of January, 1940. 590

YIELDING AND PAYING THEREFOR as rent for the month of January, 1925, a sum equal to ten per cent (10%) of the gross retail sales made by the Lessee in the demised premises during that month, payable on January 31st, 1925; and thereafter the sum of Thirty-two thousand dollars ($32,000) yearly by equal monthly payments of Two thousand six hundred sixty-six dollars and sixty-seven cents ($2666.67) each, payable on the last day of February, 1925 and on the last day of each and every month thereafter; and also an additional sum each year equivalent to one-half of the amount, if any, by which the taxes assessed for that year upon the said Brown Building and the land under the same shall exceed the taxes assessed thereon as of April 1, 1924, such additional sum to be payable each year on the first day of December next succeeding the date as of which such increased taxes are assessed; and also further additional sums each year equivalent to interest at the rate of six per cent (6%) per annum upon one-half of the amount of all betterment assessments, if any, which may hereafter be 591

592 assessed upon the said Brown Building or the land under the same for betterments hereafter effected, such further additional sums to be payable in equal monthly installments with the monthly rent hereinbefore reserved commencing when the betterment assessments upon which the same are computed become payable; all of the foregoing rents and additional rents to be payable during the term hereby demised and for such further time as the said Lessee or any person or persons claiming under it shall hold the demised
593 premises or any part thereof, and also at the same rate for any part of a month unexpired at the legal termination of this lease or upon the surrender of the premises by the Lessee after its expiration.

The Lessee shall have the right to contest or review, by legal proceedings or in such other manner as it deems suitable, which proceedings if instituted shall be conducted promptly at its own expense and free of expense to the Lessors (but Lessors covenant and agree to join in such applications if required by laws, requirements, regulations or authorities wherein premises are located),
594 any taxes, assessments, water rates or governmental charges imposed upon or against the parcel of land or buildings or improvements thereon above described; and shall also have the right to contest any orders or requirements of any governmental authority or otherwise directing or ordering the making of any alterations, repairs, changes or improvements to the demised premises; and the Lessors do hereby make, constitute and appoint the Lessee their true and lawful attorney in fact, in their name or in the name of the Lessee as their agent, to file any tax protests or other papers necessary or required in connection with any of

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

the foregoing, and at Lessee's cost and expense to take and prosecute any and all proceedings and take advantage of any remedies which in Lessee's opinion shall be necessary and/or proper in relation thereto. The legal proceedings herein referred to shall include appropriate appeals from any judgments, decrees, orders and certiorari proceedings and appeals from orders therein, but all such legal proceedings shall be begun as reasonably soon as possible after the imposition of any contested lien and shall be prosecuted to final adjudication with all promptness and despatch. The Lessee will indemnify the Lessors against all penalties, interest, and extra charges which may result in any way from proceedings taken hereunder by, or at the request of, the Lessee. 595 596

AND THE LESSEE for itself, its successors and assigns, COVENANTS AND PROMISES to and with the Lessors and their heirs, assigns and successors in trust, that during said term and for such further time as it or anyone claiming under it shall hold the demised premises or any part thereof:

(a) The Lessee will pay to the Lessors, in the manner and at the times above specified, the several sums hereinbefore reserved and stipulated to be paid as rent, and will also pay all water rates, charges for gas and electricity and other service charges whatsoever to which the demised premises or any part thereof may become liable: 597

(b) The Lessee will keep all and singular the demised premises (including the doors, windows, plate glass, partitions, stairways, gallery, floor and wall surfaces, and all pipes, faucets, valves, radiators, machinery and other fixtures and equipment which serve demised premises exclusively and which are subject to control of Lessee or in

598 its use, but excluding the frame and permanent structure of the building), in the same good order and condition as the same are now in or may hereafter be put into by the Lessors or the Lessee, reasonable use and wear and damage by fire only excepted; and will also repair all damage to said demised premises caused by reasonable use and wear if, when, and as such repairs become necessary in order to maintain said premises in good working order and tenantable condition;

(c) The Lessee will save the Lessors harmless and indemnified against all loss, liability and ex-
599 pense by reason of any accident or injury to persons or property, however, caused, occurring upon the demised premises, or by reason of any accident or injury to persons or property, wherever occurring, caused by anything done, omitted or kept on the demised premises or by the use or abuse of any fires, boilers, pipes, machinery, equipment, steam, water, gas or electricity thereon, or by neglect in the care or use of coal-holes and the covers thereto, or in not removing ice and snow from the sidewalks adjacent to the demised premises.

600 (d) No alterations or additions shall be made to the demised premises without the approval in writing of Lessors, excepting such alterations as are shown upon the plan approved by the Lessors at the time of the execution hereof. The Lessee shall have the right and privilege of erecting and maintaining upon the demised premises signs similar to those which it is now accustomed to use in Boston in connection with its own business, and signs of a similar character for its subtenants. No other signs shall be placed on the outside of the demised premises except with the approval in writing of the Lessors;

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 53⅓1).

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(e) The Lessee will at all times keep open and free for passage the stairway leading from the upper floors to the Atlantic Avenue entrance of the building;

(f) The Lessee will not, without the consent in writing of the Lessors, assign this lease or the term hereby demised:

(g) The Lessee will not underlet the whole or any part of the demised premises for use as a restaurant, lunchroom, eating-house, bakery, kitchen, candy-factory, or place for the manufacture, storage, bottling, packing, shipping or sale of intoxicating liquors or alcoholic beverages of any kind (excepting that intoxicating or alcoholic beverages may be dealt in in the same manner and to the same extent as is permitted by the laws of the United States and of the Commonwealth of Massachusetts at present in force, PROVIDED that in no event shall such beverages be advertised or publicly exhibited for sale) nor to anyone except high-grade tenants whose presence will not be detrimental in any way to the Brown Building or to the rental value of the offices therein, or interfere with the Lessors keeping said building insured against fire in companies satisfactory to them or increase the premium payable for such insurance, unless the Lessee pays such increase in insurance premium; the Lessee will not permit the demised premises or any part thereof to be occupied by any person except as aforesaid, and in case any tenant or occupant of any part of the demised premises ceases for any reason to come within the terms of the foregoing exception the Lessee will cause such tenant or occupant to be removed from the demised premises forthwith upon demand by the Lessors:

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603

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

604 (h) The demised premises shall not be overloaded, damaged or defaced and the Lessee will not make or suffer any waste thereof; no condition shall exist or activity be carried on in the demised premises which shall be unlawful, improper, noisy, offensive, or contrary to any law of the Commonwealth or any ordinance, by-law, rule, or regulation of the City of Boston or other duly constituted authority for the time being in force, or which shall impair the rental value of the offices in the Brown Building or which shall interfere with Lessors keeping said building in-
605 sured against fire in companies satisfactory to them, or increase the premium payable for such insurance, unless Lessee pays such increase in insurance premium; no intoxicating liquors nor alcoholic beverages of any kind shall be manufactured, stored, bottled, packed, shipped, sold, exposed for sale, exhibited, dispensed, delivered or consumed upon the demised premises or any part thereof (excepting that intoxicating or alcoholic beverages may be dealt in in the same manner and to the same extent as is permitted by the laws of the United States and of the Commonwealth of Massachusetts at present in
606 force, PROVIDED that in no event shall such beverages be advertised or publicly exhibited for sale); the demised premises shall not be used for a restaurant, lunch-room or eating-house; and neither cooking nor candy making of any kind shall be done on the demised premises; but notwithstanding any restriction hereinbefore contained as to subletting or use, it is understood and agreed that in the event Lessee shall sublet demised premises or any part thereof to Louis K. Liggett Company, or any subsidiary or allied company thereof, or to any other person, firm or corpora-

tion for use as a drug-store, that such sub-tenant may prepare and sell coffee, tea, and cocoa and may sell soda fountain luncheons on the demised premises in connection with the drug-store business. In case Lessee makes a sublease of any part of the demised premises to said Louis K. Liggett Company or any allied interests, Lessee will pay or cause to be paid to William Pease O'Brien, broker, the regular commission on such sublease in accordance with the schedule and custom established by the Boston Real Estate Exchange. 607

(If) The Lessee will employ George C. Appleton & Son as its Agent for subletting space on the premises hereby demised until the entire premises aforesaid shall have been sublet or put into actual use by it and thereafter until the employment is terminated by notice as hereinafter provided, and will pay said George C. Appleton & Son therefor one percentum (1%) commission on subleases during such employment. The Lessor will refer to said George C. Appelton & Son all real estate brokers provided, however, that it shall have the righf, which is hereby reserved, of personally negotiating leases with sub-tenants where no broker is involved, in which latter event no commission shall be payable by it. Where other brokers are involved and procure said sub-tenants the Lessee will pay as a total commission to George C. Appleton & Son or to such broker through them the regular Boston brokerage rates upon such subleases negotiated through other brokers. The Lessee shall have the right to revoke this Agency upon thirty (30) days' written notice at any time after the entire premises shall have been sublet or put into actual use by it as aforesaid. 608 609

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

610 (i) The Lessors may at seasonable times enter to view the demised premises and to make repairs and alterations thereto necessary for the safety or preservation of the premises or building, if they so elect, and may show the demised premises to others and may at any time within one year next before expiration of said term affix to any suitable part of the premises a notice for letting or selling the same or any part thereof and keep the same so affixed without hindrance or molestation.

(j) At the end of the said term the Lessee will peaceably yield up to the Lessors the said prem-
611 ises, together with all present and future erections or additions on or to the same vacant and unoccupied, and in good tenantable order and condition, and will repair and make good any damage done to the demised premises by reason of the removal of any fixtures, appliances, or installations of the Lessee.

THE LESSORS covenant and agree that the demised premises will be delivered to the Lessee upon the commencement of the term of this lease in as good condition as the same now are, free from debris, and free from all tenancies and occu-
612 pancies, and free from all orders and notices of violation of all public and quasi-public authorities, and free from complaints and/or reports of violations noted or existing in or filed with any Federal, State, County, Municipal and/or Borough authorities, PROVIDED, that the Lessors shall have until January 15, 1925 to remove debris, and that any default on their part in the performance of this covenant (except as to tenancies and occupancies) shall give the Lessee no right except to make good such default at the Lessors' expense. The Lessors further warrant, represent and agree

613

that the lease heretofore held upon the demised premises or portions thereof by Edward A. O'Donnell (and under which lease the Lessee heretofore occupied a portion of the said demised premises for a Cigar Store) has been terminated, and that Edward A. O'Donnell has no claim whatsoever to or upon the demised premises or any portion thereof, and that Lessors have full power, right and authority to make and execute this lease to the Lessee; and the Lessee hereby waives all claim to demised premises other than under this lease.

614 THE LESSORS further covenant and agreed that they will, so long as this lease remains in force, furnish all steam heat that shall be reasonably required by the Lessee for heating the demised premises at all times when artificial heat shall be necessary for the use of the occupants of the demised premises and for protecting the piping therein from freezing, such steam heat to be delivered to the Lessee's steam-pipes at such point in the basement as may be designated by the Lessors, and the Lessors to be under no obligation with respect to the maintenance of the steam piping and radiation on the premises demised. In 615 consideration of the foregoing agreement of the Lessors, the Lessee covenants that the Lessee and all persons occupying the demised premises shall purchase their requirements of electric current from such source as may be designated by the Lessors, PROVIDED that the price of such current does not exceed that charged by the Edison Electric Illuminating Company of Boston.

PROVIDED ALWAYS, and these presents are upon this condition, that in case of a breach of any of the Lessee's covenants, promises or agreements contained herein or in any modification hereof

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

616 which may be made between the parties hereto, or in case the estate hereby created shall be taken from the Lessee on execution or other process of law, and shall remain so taken for thirty (30) days after notice by Lessors, or if the Lessee shall be declared bankrupt or insolvent according to law, or shall signify its assent to be declared bankrupt or insolvent, or if any assignment shall be made of its property for the benefit of its creditors, or if any receiver or receivers of the property of the Lessee shall be appointed, and such receivership shall not be terminated within thirty
617 (30) days after notice by Lessors, then and in any of the said cases, notwithstanding any license of any former breach of covenant or waiver of the benefit thereof, or consent thereto in a former instance, the Lessors lawfully may immediately or at any time thereafter, and without demand or notice, enter in and upon the premises or any part thereof in the name of the whole and repossess the same as of their former estate and expel the Lessee and remove its effects forcibly if necessary, without being deemed guilty of any manner of trespass, and without prejudice to any other remedies which might otherwise be used for ar-
618 rears of rent or former breaches of covenant, and upon entry as aforesaid this lease and the estate hereby created shall terminate. Lessee shall in any event be entitled to ten (10) days' written notice of any default under the provisions of this lease, and shall have opportunity during such period to remedy any such default prior to any termination of this lease.

And the Lessee covenants that in case of a termination of the estate hereby created by an entry for breach of the foregoing condition, the Lessee will indemnify the Lessors for all loss and

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

damage which Lessors may suffer during the residue of the original term above specified by reason of such termination, whether by decreased rent from said premises or otherwise. 619

And provided further that if at any time during said term, the building of which demised premises constitute a part shall be so damaged by fire or other unavoidable casualty that said building or a substantial part thereof shall thereby be rendered unfit for use or occupancy, or in case said premises or any part thereof shall be taken for a public use, then, and in either of said cases, this lease and the estate hereby created shall, at the election of the Lessors, come to an end; and the Lessee shall also have the privilege in the event of a partial taking for a public use, of terminating and cancelling this lease if in its sole and uncontrolled opinion the portion remaining shall not be suitable for its use; and such election by either party may be made in case of any such taking, notwithstanding that the entire interest of the Lessors may have been divested by such taking; and if the Lessors shall not so elect, a just proportion of the rent hereinbefore reserved according to the nature and extent of the injury sustained by the demised premises, shall be abated or suspended until such demised premises, or in case of such taking what may remain thereof, shall have been put in proper condition for use and occupancy, and provided further that all right to compensation in damages by reason of such taking, destruction or damage shall be and remain in the Lessors. In the event of a partial damage to the premises by fire, not amounting to such a substantial damage as will permit the Lessors to cancel this lease, or in case of any damage by fire where the Lessors do not elect to terminate, the 620 621

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

622 Lessors agree, within a reasonable time, at their own expense, to restore the premises, exclusive of fixtures, to the condition in which they were prior to the damage.

IN WITNESS WHEREOF, the said THOMAS HASSALL BROWN and DAVENPORT BROWN, as they are Trustees of said Atherton Thayer Brown Association, but not individually, have signed and sealed this instrument, and the UNITED CIGAR STORES COMPANY OF AMERICA has caused these presents to be signed in its name by its Vice President thereunto
623 duly authorized and its corporate seal to be hereto affixed on the day and year first above written.

THOMAS HASSALL BROWN
DAVENPORT BROWN
As Trustees of the Atherton Thayer Brown Association, but not Individually.

UNITED CIGAR STORES COMPANY OF AMERICA
By A. L. STEINFELD
Vice Pres.
(Seal)

In Presence of:
624 Witness as to
H. BROWN & D. BROWN,
PERCY LORING

OK RW
ALS

COMMONWEALTH OF MASSACHUSETTS

Suffolk—ss.

On this 8th day of January, 1925 before me personally came Thomas Hassall Brown and Davenport Brown, to me personally known and

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

625 known to me to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed as Trustees of the Atherton Thayer Brown Association.

KENNETH D. JOHNSON,
Notary Public.
(seal)

STATE OF NEW YORK

County of New York—ss.

626 On this ninth day of January in the year 1925 before me personally came A. L. Steinfeld to me known, who being by me duly sworn, did dispose and say that he resided in New York City, N. Y.; that he is the Vice-president of United Cigar Stores Company of America, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; and that it was so affixed by

Form 2
No. 20665 Series B

627

State of New York,
County of New York—ss.:

I, JAMES A. DONEGAN, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county,

DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that Harry Rubenoff whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a NOTARY PUBLIC acting in and for said

Claimant's Lease With Debtor (Filed With Proof of Claim, No. 5341).

628 county, duly commissioned and sworn, and qualified to set as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Bronx with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be 629 read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 28th day of January 1925.

JAMES A. DONEGAN,
Clerk.

630 Boston, February 2, 1925 at 9 o'clock and 52 minutes, A. M. Received and Entered with Suffolk Deeds Libro 4640, Page 284. Attest.

WM. T. A. FITZGERALD,
Register.

Statement of Trustee's Objection to Claim of Thomas H. Brown et al. (No. 5341). 631

The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of Thomas H. Brown et al. (No. 5341) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5341 by Thomas Hassal Brown and Davenport Brown as they are Trustees of the Atherton Thayer Brown Association under an 632
agreement and Declaration of Trust dated September 25, 1914 (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $103,917.10 with int. Your petitioner objects to the allowance of said claim for the following reasons:

The Trustee objects to the allowance of this claim for the reason that, at the request of the claimants, by agreement dated November 28, 1932, the Debtor assigned the lease upon which this claim is based to the claimants' nominee, Percy Loring, and by said agreement the claimants 633
expressly assumed all existing and future obligations required under said lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder.

Trustee's Exhibit 22, April 2, 1935.

634 (ASSIGNMENT AGREEMENT)

CBM L-198

ASSIGNMENT AGREEMENT, made this 28th day of November, 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, THOMAS HASSAL BROWN and DAVENPORT BROWN, as Trustees of Atherton Thayer Brown Association under agreement and Declaration of Trust, dated September 25, 1914, care of Geo. C. Appleton & Son, as
635 Agent, 31 State Street, Boston, Massachusetts, (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated January 8, 1925, (hereinafter called the Lease), covering certain premises located at 185 Summer Street,
636 known as the Brown Building, in the City of Boston, State of Massachusetts (hereinafter called the Premises), for a term commencing January 1st, 1925 and expiring January 31st, 1940.

2. Certain portions of the Premises have been sublet by the Bankrupt or its predecessors in interest to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated

Trustee's Exhibit 22, April 2, 1935.

bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy of the Bankrupt and qualified. 637

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November first, 1932, the Trustee was authorized to reject the Lease and abandon the fixtures and furnishings, if any, contained in that portion of the Premises formerly operated as a store by the Bankrupt, or in lieu of such rejection, in its discretion, and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, 638 title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease and said fixtures and furnishings, if any, and the Landlord has requested such assignment.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to Percy Loring any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which 639 is hereinafter set forth, and in and to any and all fixtures and furnishings contained in that portion of the Premises formerly operated as a store by the Bankrupt.

SECOND: The Bankrupt hereby assigns to Percy Loring any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue on and after September 1, 1932 under said agreements of

sublease, and in and to any and all of said fixtures
610 and furnishings.

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein from the subtenants under said agreements of sublease in respect of rent accrued thereunder on and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the
641 Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to
642 be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

FIFTH: The landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease, said agreements of sublease and said fixtures and furnishings, if any, hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing,

Trustee's Exhibit 22, April 2, 1935.

any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises, and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease and fixtures and furnishings, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises. 643 644

RIDER

The Landlord does not release Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt from any liability of any nature with respect to the said portion thereof, if any, used and occupied by the Trustee and/or the Ancillary Receiver, as a cigar store, payment in respect of which is to be determined by the Court having jurisdiction. In no event shall the liability of the Irving Trust Company as Trustee exceed the liquidated value of the assets of the bankrupt estate. Nothing in this Article Fifth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or 645

646 preclude the Trustee from contesting such proof or allowance.

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease or any fixtures and furnishings hereby assigned and does not assume the Lease or any agreement of sublease or any
647 responsibility therefor or otherwise. The liability of the Trustees of the Atherton Thayer Brown Association is in their representative capacity only and their agreements hereunder shall not bind their individual property or estates.

IN WITNESS WHEREOF, the parties hereto have *duly* executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
As Trustee in Bankruptcy for United
648 Cigar Stores Company of America,
By JOSEPH T. STEARNS,
Assistant Secretary.

THOMAS HASSEL BROWN,
As Trustee.

DAVENPORT BROWN,
As Trustee.

UNITED CIGAR STORES COMPANY
OF AMERICA,
By GEO. J. WISE,
Vice President.

Trustee's Exhibit 22, April 2, 1935.

SCHEDULE OF SUBLEASES:

649 Name of Tenant—Benjamins, Inc. Date of Lease—February 16, 1932. Date of Expiration—March 31, 1933. The Security thereunder having been applied on account of rent.

Name of Tenant—Howard, Inc., Cleaners and Dyers. Date of Lease—July 14, 1932. Date of Expiration—January 30, 1940. Together with the Guaranty therewith made by Eagle Cleaners & Dyers, Incorporated.

Name of Tenant—Milligan Hardware Company. Date of Lease—February 21, 1925 (as amended). Date of Expiration—January 31, 1935.

650 Name of Tenant—Rawding Bus Lines, Inc. Date of Lease—February 1, 1932. Date of Expiration—April 30, 1933.

Name of Tenant—Pasquale Santosuosso and Michael Santosuosso. Date of Lease—May 18, 1932. Date of Expiration—May 31, 1934.

Name of Tenant—Carmine Solimine. Date of Lease—March 26, 1925 (as amended). Date of Expiration—January 31, 1940. Together with whatsoever right, title and interest the bankrupt and Trustee may have in and to that certain chattel mortgage dated June 14, 1926, given as security under the said lease of March 26, 1925, 651 without any recourse in any event to the bankrupt or Trustee in any capacity whatsoever and subject to the right, if any, of United Stores Realty Corporation, Bankrupt, its successors and assigns in and to the said chattel mortgage.

Name of Tenant—Peter Zetoonjian. Date of Lease—November 9, 1931. Date of Expiration—October 31, 1932. The security deposited under the sublease is being held subject to the subtenant's instructions. This lease expired by its terms October 31, 1932 and it may be that the tenant is holding over.

Trustee's Exhibit 23, April 2, 1935.

652 (Acknowledgments)

Acknowledgment of Geo. J. Wise as Vice-President of United Cigar Stores Company of America, on December 8, 1932, before Ann L. Reilly, Notary Public, New York.

Acknowledgment of Joseph T. Stearns as Assistant Secretary of Irving Trust Company as Trustee in Bankruptcy, on December 8, 1932, before Alma Berger, Notary Public, Queens County.

Acknowledgment of Thomas Hassal Brown and Davenport Brown on November 28, 1932 before
653 Henry B. Hosmer, Notary Public, Massachusetts.

Trustee's Exhibit 23, April 2, 1935.

CWD:SW Dec. 8, 1932.

Mr. Percy Loring,
c/o Goodwin, Proctor & Hoar,
84 State Street,
Boston, Mass.

654 Store No. 198

Dear Sir:

We are enclosing herewith copy of executed assignment agreement dated November 28th, made between Irving Trust Company, as Trustee in Bankruptcy for United Cigar Stores Company of America; Thomas Hassal Brown and Davenport Brown, as Trustees of Atherton Thayer Brown Association under agreement and Declaration of Trust, dated September 25, 1914, and United Cigar Stores Company of America, covering prem-

Trustee's Exhibit 23, April 2, 1935.

ises located at 185 Sumner Street, known as the 655
Brown Building, in the City of Boston, State of Massachusetts.

We are also enclosing herewith the following leases and subleases:

Lease dated January 8, 1925 made between Thomas Hassal Brown and Davenport Brown, Trustees and the United Cigar Stores Company of America.

Sublease dated February 16, 1932 made between Benjamins, Inc. and the United Cigar Stores Company of America. The se- 656
curity thereunder having been applied on account of rent.

Sublease dated July 14, 1932, made between Howard, Inc. Cleansers and Dyers and the United Cigar Stores Company of America, together with the Guaranty therewith made by Eagle Cleansers & Dyers, Incorporated.

Sublease dated February 21, 1925 (as amended) made between Milligan Hardware Company and the United Cigar Stores Company of America.

Sublease dated February 1, 1932, made between Rawding Bus Lines, Inc., and the 657
United Cigar Stores Company of America.

Sublease dated May 18, 1932, made between Pasquale Santosuosso and Michael Santosuosso and the United Cigar Stores Company of America.

Sublease dated March 26, 1925 (as amended) made between Carmine Solimine and the United Cigar Stores Company of America; together with whatsoever right, title and interest the bankrupt and Trustee may have in and to that certain chattel mort-

658 gage dated June 14, 1926, given as security under the said lease of March 26, 1925, without any recourse in any event to the bankrupt or Trustee in any capacity whatsoever and subject to the right, if any, of United Stores Realty Corporation, Bankrupt, its successors and assigns in and to the said chattel mortgage.

Sublease dated November 9, 1931, made between Peter Zetoonjian and the United Cigar Stores Company of America. The security deposited under the sublease is being held subject to the subtenant's instructions.
659 This lease expired by its terms October 31, 1932 and it may be that the tenant is holding over.

There are also enclosed separate assignments of tenants leases to Percy Loring as follows:

Benjamins, Inc. Lease dated 2/16/32 Expires 3/31/33

Howard, Inc. Lease dated 7/14/32 Expires 1/30/40

Eagle Cleansers & Dyers, Inc. Lease dated 7/14/32, which is part of Howard, Inc. sub-
660 lease.

Milligan Hardware Company Lease dated 2/21/25 Expires 1/31/35

Rawding Bus Lines, Inc. Lease dated 2/1/32 Expires 4/30/33

Michael Santosuosso Lease dated 5/18/32 Expires 3/31/34

Carmine Solimine Lease dated 3/26/32 Expires 1/31/40

Together with right, title and interest in chattel mortgage dated June 8, 1926.

Trustee's Exhibit 24, April 2, 1935.

Peter Zetoonjian Lease dated 11/9/32
Expires 10/31/32 661

Kindly acknowledge receipt.

Yours very truly,

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United Cigar
Stores Company of America,
By E. PAUL PHILLIPS

Registered Mail—
Return Receipt Requested.
Registered Return Receipt attached
to original.

662

Trustee's Exhibit 24, April 2, 1935.

October 27, 1932.

Irving Trust Company,
Trustee in Bankruptcy of
United Cigar Stores
Company of America,
625 Madison Avenue,
New York, N. Y.

Dear Sirs:

The undersigned, as landlord under Lease No. 198 covering the premises located in the building numbered 185 Summer Street, Boston, Massachusetts, hereby requests an assignment of all right, title and interest in and to said lease and in and to the subleases thereunder of Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America and the Bankrupt. 663

Very truly yours,

T. HASSALL BROWN (signed)
DAVENPORT BROWN (signed)
Trustees of Atherton Thayer Brown
Association

Statement of Contents of Proof of Claim of Isidor A. Rubel et al. (Claim No. 5312).

664

The following is a statement of the contents of the proof of claim of Isidor A. Rubel and Flora L. Rubel filed in the within reorganization proceedings.

The claimants are the owners of a claim against the Debtor based upon or arising out of a lease dated December 14, 1923, between Isidor A. Rubel and Flora L. Rubel, and the Debtor, commencing prior to August 29, 1932, and ending on April 30, 1944, or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy on or about August 31, 1932, or for damages or indemnity under a covenant or covenants contained in said lease.

665

The Trustee in Bankruptcy surrendered the premises covered by said lease on August 31, 1932, and the Landlord re-entered said premises on August 31, 1932. Except as shown in the proof of claim, neither the debtor nor the Trustee in Bankruptcy has paid the rent or other obligations accruing under said lease after August 31, 1932.

666

The claimants compute the amount owing to them on the date of the approval of the petition for reorganization as follows:

> The total lease obligations not paid by the Debtor amount to $205,082.53. This sum is made up of the fixed rent for the entire term ($173,333.33) plus taxes, insurance and other payments required to be made by Debtor for the entire term ($31,749.20). From this total lease obligations, there is deducted the sum of $49,547.14, which consists of the fair rental value of the leased premises

Statement of Contents of Proof of Claim of Isidor A. Rubel et al. (Claim No. 5312).

667

from the date of rejection of the lease to the end of the term ($47,270.30), and dividends in bankruptcy proceedings on any claim based upon the original lease ($2,276.84). The total amount claimed for the entire term of the original lease is therefore $155,535.39.

The total amount of the claim allowable under Section 77B on a parity with debts which would be provable under Section 63(a) amount to $49,127.33. This is made up by deducting from the total lease obligations accrued up to the date of surrender or re-entry ($5,347.10) which consists 668
of taxes, assessments, and other payments accrued up to the date of surrender or re-entry, the sum of $2,276.94, being dividends paid in the bankruptcy proceeding on any claim based on the original lease. This leaves a total of $3070.26, being the unpaid lease obligations accrued up to the date of surrender or re-entry whichever first occurred. Added to this last sum is the sum of $46,057.07, being the total lease obligations for the three year period or for the balance of the term if less than three years and consists of the fixed rent reserved in the lease without reservation for 669
three years succeeding the date of surrender or re-entry ($43,333.33) plus taxes, assessment, and other payments to be made over said three year period ($2,722.74).

Paragraph V is the same as paragraph V in the proof of claim printed in Claim No. 5304 (p. 64).

No part of the claim has been paid; there are no set-offs or counterclaims; the claimant has not received security for said debt; no judgment has been rendered therefor; a claim based on said lease

670 was filed in said bankruptcy proceeding and was not allowed.

The proof of claim was executed by the claimants before a notary public on September 18th, 1934.

The Claimants appoint Solomon E. Harrison, their attorney to act for them in the reorganization proceeding.

Attached to the proof of claim is the original lease between the debtor and claimant substantially in the form of the lease printed in Claim
671 No. 5304 (pp. 67-67*o*), including a similar forfeiture clause.

Statement of Trustee's Objection to Claim of Isidor A. Rubel et al. (No. 5312).

The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of Isidor A. Rubel et al. (No. 5312) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objec-
672 tion and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5312 by Isidor A. Rubel and Flora L. Rubel (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $155,535.39 with interest. Your petitioner objects to the allowance of said claim for the following reasons:

The Trustee objects to the allowance of this claim in whole or in part for the reason that the

lease upon which the claim is based was never 673
rejected by the Trustee in Bankruptcy. Moreover, by agreement dated October 22, 1932, the Trustee and the Debtor assigned to the claimants their respective right, title, and interest in and to said lease, and by said agreement the claimants assumed all existing and future obligations required under said lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder.

674

Trustee's Exhibit 27, April 2, 1935.

ASSIGNMENT AGREEMENT

GRF:EM #2109

ASSIGNMENT AGREEMENT, made this 22nd day of October, 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, ISIDOR A. RUBEL AND FLORA L. RUBEL, of Windemere Hotel, 675
Chicago, Illinois, (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord and the Bankrupt are parties to a written agreement of lease dated December 14, 1923 (hereinafter called the Lease),

Trustee's Exhibit 27, April 2, 1935.

676 whereby there was leased to the Bankrupt certain premises located at the northwest corner of 61st Street and Calumet Avenue, and known as #320-332 61 Street and 6058 Calumet Avenue, (hereinafter called the Premises), for a term commencing May 1, 1924 and expiring April 30, 1944.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

677 3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 21, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to
678 the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST: The Trustee hereby assigns to Isidor

Trustee's Exhibit 27, April 2, 1935.

A. Rubel any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth. 679

SECOND: The Bankrupt hereby assigns to Isidor A. Rubel any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease. 680

THIRD: The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof and less the amount of such rent, if any, theretofore paid to the Landlord. 681

FOURTH: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

FIFTH: The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of

Trustee's Exhibit 27, April 2, 1935.

682 United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants
683 and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises (other
684 than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

RIDER

It is understood and agreed, however, that nothing in Article 5 of this agreement, or in any other portion of this agreement, shall be deemed a waiver by the landlord to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled.

Trustee's Exhibit 27, April 2, 1935.

SIXTH: The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise. 685

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written. 686

IRVING TRUST COMPANY,
As Trustee in Bankruptcy for United Cigar Stores Company of America,
By JOSEPH T. STEARNS,
Assistant Secretary.

ISIDOR A. RUBEL, 687
FLORA L. RUBEL,
Landlord.

UNITED CIGAR STORES COMPANY OF AMERICA,
By GEO. J. WISE,
Vice President.

Trustee's Exhibit 28, April 2, 1935.

688 SCHEDULE OF SUBLEASES:

Tenant—Irving Dexter. Premises—Store No. 1, 322 E. 61st St. Lease Expiration Date—April 30, 1933.

Tenant—Peter Pour & Verley A. Sanders. Premises—Store No. 3, 324 E. 61st St. Lease Expiration Date—April 30, 1935.

Tenant—David M. Diamond. Premises—Store No. 6, 330 E. 61st St. Lease Expiration Date—April 30, 1936.

Tenant—Mildred Mitchell. Apartment 2nd fl. Lease Expiration Date—April 30, 1933.

689 Acknowledgment of Geo. J. Wise, as Vice President of United Cigar Stores Company of America, on November 26th, 1932 before Ann L. Reilly, Notary Public, New York.

Acknowledgment of Joseph T. Stearns, as Assistant Secretary of Irving Trust Company, as Trustee in Bankruptcy, on November 25, 1932, before Alma Berger, Notary Public, Queens County.

Trustee's Exhibit 28, April 2, 1935.

690

November 29, 1932

EH
Registered Mail
Isidor A. Rubel and Flora L. Rubel,
Windemere Hotel,
Chicago, Ill.

Re: Store No. 2109

Dear Sir and Madam:—

We are returning herewith copy of executed assignment agreement dated October 22nd, 1932,

Trustee's Exhibit 28, April 2, 1935.

made between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Isidor A. Rubel and Flora L. Rubel, and United Cigar Stores Company of America, covering premises located at the northwest corner of 61st Street and Calumet Avenue, Chicago, Illinois. 691

We are also enclosing herewith the following lease and subleases:

Lease dated December 14th, 1923 made between Isidor A. Rubel and United Cigar Stores Company of America; 692

Sublease dated May 5th, 1932 made to Mildred Mitchell;

Sublease dated May 27th, 1927 made to Peter Pour and Verley A. Sanders;

Sublease dated April 18th, 1932 made to Irving Dexter;

Sublease dated April 23rd, 1931 made to Leo Leventhal, together with assignment dated July 31, 1931, and amendments dated January 28th, 1932, March 10th, 1932 and June 17th, 1932.

Kindly acknowledge receipt. 693

Yours very truly,

IRVING TRUST COMPANY, as
Trustee in Bankruptcy for UNITED
CIGAR STORES COMPANY OF AMERICA,
by E. PAUL PHILLIPS

Encs.

Registered Return Receipt attached to original.

Statement of Contents of Proof of Claim of Louise S. Whitcomb et al. (No. 5302).

694 The following is a statement of the proof of claim of Louise S. Whitcomb and Florence Welsh, filed in the within proceeding:

The claimants are the owners of a claim against the debtor based upon or arising out of the lease dated October 7, 1924, between claimants and debtor for a term commencing August 29, 1932, and ending on August 31, 1935, or for injury resulting from the rejection of said lease by the trustee in bankruptcy on or about August 31, 1932, or for damages or indemnity under a cove-
695 nant or covenants contained in said lease. The trustee in bankruptcy surrendered the premises on August 31, 1932, and the landlord re-entered said premises on September 1, 1932. Except as shown in the proof of claim neither the debtor nor the trustee in bankruptcy has paid the rent or other obligations accruing under said lease after August 31, 1932.

The claimants compute the amount owing to them on the date of the approval of the petition for reorganization as follows:

696 The total lease obligations which have not been paid by the debtor amount to $21,741.11 and consist of the net rent for the entire term not paid ($17,700), plus taxes, insurance and other payments required to be made but not made ($4,041.11). There is deducted from this total lease obligation the sum of $9,060, consisting of the fair reasonable value of the leased premises from the date of rejection of the lease to the end of the term. The total amount claimed for the entire term of the original lease is, therefore, $12,681.11.

The total amount of the claim allowable under

Statement of Contents of Proof of Claim of Louise S. Whitcomb et al. (No. 5302).

697

Section 77B on a parity with debts which would be provable under Section 63(a) amounts to $12,681.11. This sum consists of the entire lease obligations accrued up to the date of surrender or re-entry, whichever first occurred ($499.20), plus the total lease obligations for three year period or for the entire balance of the term, if less than three years ($19,229.91).

The total lease obligations accrued up to the date of surrender or re-entry consists of taxes, assessments and other payments up to the date of surrender or re-entry which were not paid.

698

The total lease obligations for that three year period consists of the net or fixed rent reserved in the lease, without acceleration, for three years next succeeding the date of surrender or re-entry, whichever first occurred ($16,200), plus taxes, insurance and other payments required to be made during the three year period ($3029.91).

Paragraph V is the same as Paragraph V of the proof of claim printed in Claim No. 5304 (p. 64).

No part of the claim has been paid; there are no set-offs or counterclaims thereto; claimant has not received any security for said debt; no judgment has been rendered therefor; a claim based on said lease was filed in said bankruptcy proceeding and was not allowed.

699

The proof of claim is executed by the claimants before a notary public on September 4, 1934.

The claimants appoint Solomon E. Harrison their attorney to act for them in the proceeding.

Attached to the proof of claim is the original lease between debtor and the claimant substantially in the form of the lease printed in Claim No. 5304 (pp. 67-67*o*), including a similar forfeiture clause.

Statement of Trustee's Objection to Claim of Louise S. Whitcomb et al. (No. 5302).

700 The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of Louise S. Whitcomb et al. (No. 5302) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5302 by Louise S. Whitcomb and Florence Welch (hereinafter called the Claim-
701 ant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $12,681.11 with interest. Your petitioner objects to the allowance of said claim for the following reasons:

The Trustee objects to the allowance of this claim in whole or in part for the reason that by agreement dated December 3, 1932, the Debtor assigned to the claimants all its right, title, and interest in and to the lease upon which the claim is based, and by said agreement the claimants assumed all existing and future obligations re-
702 quired under said lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder.

Trustee's Exhibit 34, April 2, 1935.

(Marked in evidence at folio 942.)

703

CHF:AB S.1295

ASSIGNMENT AGREEMENT, made this 3rd day of December, 1932 between Irving Trust Company, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of United Cigar Stores Company of America (hereinafter sometimes called the Trustee), party of the first part, LOUISE S. WHITCOMB and FLORENCE WELCH of Battle Creek, Michigan and Nicholasville, Kentucky, respectively (hereinafter called the Landlord), party of the second part and United Cigar Stores Company of America, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey (hereinafter sometimes called the Bankrupt), party of the third part. 704

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated October 7th, 1924 (hereinafter called the Lease), covering certain premises; the entire three story building, including basement, situated at the northeast corner of E. Michigan Avenue and Capitol Avenue, Battle Creek, Michigan (hereinafter called the Premises), for a term commencing September 1, 1925 and expiring August 31, 1935. 705

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated

Trustee's Exhibit 34, April 2, 1935.

706 August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 18, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or it's nominee any and all right, title and interest of the Trustee in and to the
707 Lease and/or in and to said agreements of sublease. Pursuant to said order the Trustee rejected the Lease on November 21, 1932, the Landlord not having theretofore requested such assignment.

5. The Landlord now desires to obtain an assignment of the Lease and agreements of sublease from the Bankrupt and to agree with the Bankrupt and Trustee with respect to the matters hereinafter set forth.

708 NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST. The Bankrupt hereby assigns to Louise S. Whitcomb and Florence Welch any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth, including any and all of the right, title and interest of the Bankrupt in and to the

rents accrued and to accrue, from and after September 1, 1932, under said agreements of sublease. 709

SECOND. The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932, less the amount of such rent, if any, theretofore paid to the Landlord. 710

THIRD. The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt.

FOURTH. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving 711

Trustee's Exhibit 34, April 2, 1935.

712 Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the premises (other than said portion thereof, if any, 713 used and occupied by the Trustee as a cigar store).

FIFTH. The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and has not assumed and does not assume the Lease or any agreement of sublease or any responsibility 714 therefor or otherwise. The Landlord and the Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not affect in any manner the full force and validity of the rejection of the Lease by the Trustee.

(Rider).

Nothing in this ARTICLE 5 shall be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate any provable claims

to which the Bankruptcy Court may adjudge the 715
landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance.

Attached to and forming part of Assignment Agreement dated December 3rd, 1932 by and between Irving Trust Company, Trustee, and United Cigar Stores Company of America.

IN WITNESS WHEREOF, the parties hereto have 716
duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

IRVING TRUST COMPANY,
Trustee in Bankruptcy for United
Cigar Stores Company of America
By JOSEPH T. STEARNS
Assistant Secretary.

LOUISE S. WHITCOMB
FLORENCE E. WELCH 717
Landlord.

Witness to Miss Florence E. Welch's signature
CATHERINE FISHBACK
S. A. WALLACE

UNITED CIGAR STORES COMPANY
OF AMERICA,
By GEO. J. WISE
Vice-President.
(Seal)

Trustee's Exhibit 35, April 2, 1935.

718 SCHEDULE OF SUBLEASES:

Tenant—Carl R. White and Effie May White. Premises—Store #3. Expiration Date—August 30, 1935.

Tenant—Thomas P. O'Toole. Premises—Store #4. Expiration Date—August 30, 1935.

Tenant—Clifford L. Bresee. Premises—Entire second floor. Expiration Date—August 30, 1935.

Acknowledgment of Geo. J. Wise as Vice-President of United Cigar Stores Company of America on January 16, 1933 before Ann L. Reilly, Notary
719 Public, New York.

Acknowledgment of Joseph T. Stearns, as Assistant Secretary of Irving Trust Company as Trustee in Bankruptcy on January 16, 1933 before Alma Berger, Notary Public, Queens County.

Acknowledgment of Louise S. Whitcomb on December 12, 1932 before Pearl K. Spark, Notary Public, Michigan.

Acknowledgment of Florence Welch on December 15, 1932 before Margaret R. Turner, Notary Public, Kentucky.

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720 **Trustee's Exhibit 35, April 2, 1935.**

(Marked in evidence at folio 942.)

January 19, 1933

Louise S. Whitcomb and Florence Welch,
c/o Mrs. Florence E. Welch,
Nicholasville, Kentucky.

Mesdames:

Re: Store No. 1295

We are enclosing herewith executed copy of Assignment Agreement dated December 3, 1932

Trustee's Exhibit 35, April 2, 1935.

made between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Louise S. Whitcomb and Florence Welch, and United Cigar Stores Company of America, covering premises at the N/E corner of East Michigan Avenue and Capitol Avenue, Battle Creek, Michigan. 721

We are also enclosing herewith the following lease and subleases:

Lease dated October 7, 1924 made between Louise S. Whitcomb and Florence Welch, as lessors and United Cigar Stores Company of America, as lessee. 722

Sublease dated April 19, 1932 made to W. Allan Stuart, the interest of the said Stuart in and to said lease having since been acquired by Thomas P. O'Toole by agreement dated August 10, 1932.

Sublease dated January 14, 1932 made to Carl R. White and Effie May White.

Sublease dated September 11, 1931 made to Clifford L. Bresee.

Kindly acknowledge receipt.

723

Very truly yours,

IRVING TRUST COMPANY,
As Trustee in Bankruptcy of United
Cigar Stores Company of America,
By E. PAUL PHILLIPS

Encl.
Registered Mail.

Trustee's Exhibit 36(lot), April 2, 1935.

(Marked in evidence at folio 942.)

January 20th, 1933

724 Louise S. Whitcomb and Florence Welch,
c/o Mrs. Florence E. Welch,
Nicholasville, Kentucky.

Dear Mesdames:

Re: Lease 1295—N. E. Cor. East Michigan and Capitol Avenues, Battle Creek, Mich.

We are enclosing herewith United Cigar Stores Delaware Corporation check No. 22367, dated January 19th, 1933, for $419.00, drawn to the order of Louise S. Whitcomb and Florence Welch.

725 We are also enclosing a statement of Receipts and Disbursements for the period September 1st, 1932 to the date of the assignment agreement. The check is drawn for an amount in accordance with the enclosed statement of Receipts and Disbursements and in accordance with an assignment agreement dated December 3rd, 1932, and forwarded to you on January 19th, 1933.

Kindly acknowledge receipt of this letter and check.

Yours very truly,

IRVING TRUST COMPANY,
726 As Trustee in Bankruptcy of United Cigar Stores Company of America
By: E. PAUL PHILLIPS

Enc.
Registered Return Receipt attached to original.

STATEMENT OF
RECEIPTS AND DISBURSEMENTS
PREMISES—BATTLE CREEK, MICHIGAN

Receipts as listed below	$419.00
Disbursements	NIL
Net receipts	$419.00

Trustee's Exhibit 37, April 2, 1935.

STATEMENT OF
TENANTS ACCOUNTS AND COLLECTIONS
LEASE #1295

Tenants	Sept.	Oct.	Nov.	Dec.	Total	Coll.
C. L. Bresee	40.00	40.00	40.00	—	120.00	—
F. N. Ballas	—	—	—	—	—	—
J. George & N. Vasil	—	—	—	—	—	—
H. E. & R. McCoy	—	—	—	—	—	—
Thos. P. O'Toole	41.00	41.00	41.00	41.00	164.00	161.00
C. White & E. M. White	86.00	86.00	86.00	—	258.00	258.00
	167.00	167.00	167.00	41.00	542.00	419.00

Trustee's Exhibit 37, April 2, 1935.

(Marked in evidence at folio 942.)

MAXWELL B. ALLEN
Attorney and Counselor
1007 Central Nat. Tower
Battle Creek, Michigan

January 27, 1933.

Irving Trust Company,
Trustee in Bankruptcy for
United Cigar Stores Company of America,
New York City, N. Y.

Attention: Mr. E. Paul Phillips

Dear Sir:

Re: Lease 1295
Battle Creek, Mich.

As attorney for Louise S. Whitcomb and Florence Welch, I acknowledge receipt of your letters of January 19th and 20th with enclosures.

Very truly yours,

MAXWELL B. ALLEN (signed)

MBA/F

730 **Statement of Contents of Proof of Claim of Fred O. Excell et al. (Claim No. 5235).**

The following is a statement of the contents of the proof of claim of Fred O. Excell, as Trustee under the last will of Robert Excell, deceased.

The claimant is the owner of a claim against the debtor based upon or arising out of the lease dated March 4, 1920 between Michel Montague and Thomas Montague and the debtor for a term commencing prior to August 29, 1932 and ending on July 30, 1935, or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy on or about November 25, 1932, or for
731 damages or indemnity under a covenant or covenants contained in said lease.

The Trustee in Bankruptcy surrendered the premises covered by said lease on December 31, 1932. The landlord re-entered said premises on January 1, 1933. Except as shown in the proof of claim neither the debtor nor the Trustee in Bankruptcy has paid the rent or other obligations accruing under said lease after December 31, 1932. Claimant owns the claim by reason of an assignment to him of the lease upon which the claim is based by Michael Montague who in turn ac-
732 quired his interest by an assignment from Catherine S. Montague, individually and as Executrix of the last will and testament of Thomas Montague, who was one of the original lessors together with the said Michael Montague.

The claimant computes the total amount owing him on the date of the approval of the petition herein as follows:

The total lease obligations which have not been paid by the Debtor amount to $43,910.69

Statement of Contents of Proof of Claim of Fred O. Excell et al. (Claim No. 5235):

733

and consist of the total net or fixed rent for the entire term not paid by the Debtor ($28,933.38) plus taxes, insurance, assessments and other payments required to be made by the Debtor for the entire term and not made by the Debtor ($14,977.31). From this total lease obligations there is deducted the sum of $22.957.22, consisting of the fair rental value of the leased premises from the date of rejection of the lease to the end of the term ($19,242.50) and dividends paid in bankruptcy proceeding on claim based on original lease ($3,714.72). The total amount claimed for the entire term of the original lease is therefore $20,953.47.

734

The total amount of the claim allowable under Section 77B on a parity with debts which would be provable under section 63(a) amount to $28,382.92.

This sum is made up by adding lease obligations accrued up to the date of surrender or re-entry whichever first occurred ($3,714.72) to the total lease obligations for the three year period ($43,910.70) and subtracting therefrom the fair rental value of $19,242.50.

735

The unpaid lease obligations above referred to ($3,714.72) is made up by deducting from the total lease obligations accrued up to the date of surrender or re-entry ($7,429.44) consisting of taxes, etc., the sum of $3,714.72 which was paid for dividends in the bankruptcy proceeding on a claim based on the original lease. The above set figure of $43,910.70 consists of the net or fixed rent reserved in the lease without acceleration for three years next succeeding date of surrender or

Statement of Contents of Proof of Claim of Fred O. Excell et al. (Claim No. 5235).

736

the date of re-entry ($28,933.38) and taxes assessments, insurance and other payments to be made by debtor during said three year period ($14,977.32).

Paragraph V is the same as Paragraph V printed in Claim No. 5304 (p. 64).

No part of the claim has been paid; there are no set-offs or counterclaims thereto; the claimant has not received any security for said debt; no judgment has been rendered therefor; a claim based on said lease was filed in bankruptcy proceeding and was allowed in the amount of $7,429.44.

737

The proof of claim was executed by Fred O. Excell one of the Trustees of the claimant Estate, before a Notary Public on September 21, 1934.

The claimants appoint B. W. Rosenstone and Solomon E. Harrison their attorneys to act for them in the within proceeding.

Attached to the proof of claim is the original lease between claimant and debtor substantially in the form of the lease printed in Claim No. 5304 (pp. 67-67*o*), including a similar forfeiture clause.

738

Statement of Trustee's Objection to Claim of Fred O. Excell et al. (No. 5235).

739

The following is a statement of the objection filed by the Trustee of the Debtor's estate to the claim of Fred O. Excell et al. (No. 5235) which is contained in a printed document consisting of the Trustee's petition for a hearing on its objection and a notice of such hearing, in the same form as those printed in Claim No. 5304 (pp. 67*p*-72).

There has been filed with this Court a proof of claim numbered 5235 by Roy E. Bensley, Fred O. Excell and Stuart W. Excell, as Trustees under L. W. of Robert Excell, dec'd. (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $28,382.92 with interest. Your petitioner objects to the allowance of said claim for the following reasons:

740

The Trustee objects to the allowance of this claim in whole or in part for the following reasons: In the first place, the under lease between the Debtor and Michael and Thomas Montague upon which the claim is based was cancelled by merger as a result of Michael Montague, the surviving lessor, quit-claiming on December 10, 1932 all of his interest in the leased premises to the claimants as owners of the fee. Moreover, prior to such surrender of the underlying lease, and by agreement dated November 25, 1932, the Trustee in Bankruptcy and the Debtor assigned to said surviving lessor their respective right, title, and interest in and to said underlease and in connection therewith said lessor assumed all existing and further obligations required under said underlease on the part of the debtor, thereby, in effect, accepting a surrender of the lease and terminating all obligations of the Debtor thereunder.

741

Trustee's Exhibit 1, April 29, 1935.

742 (Marked in evidence at folio 945.)

GRF:MR S.#241

ASSIGNMENT AGREEMENT, made this 29th day of NOVEMBER, 1932 between IRVING TRUST COMPANY, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA, (hereinafter sometimes called the Trustee), party of the first part, MICHAEL MONTAGUE of (hereinafter called the Landlord), party of the second part and UNITED CIGAR STORES COMPANY
743 OF AMERICA, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated March 4, 1920, (hereinafter called the Lease), covering certain premises located at the three brick buildings located at the Northwest corner of Cottage Grove Avenue and 39th Street, in the City of Chicago, Illinois, having a frontage on
744 Cottage Grove Avenue of about 67 feet 7¾ inches, and a frontage on 39th Street of about 138 feet, extending from Cottage Grove Avenue West to a 10 foot alley (hereinafter called the Premises), for a term commencing JANUARY 1, 1921, and expiring July 30, 1935.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

Trustee's Exhibit 1, April 29, 1935.

3. By order of the United States District Court 745
for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 18, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the 746
Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease. Pursuant to said order the Trustee rejected the Lease on November 25, 1932, the Landlord not having theretofore requested such assignment.

5. The Landlord now desires to obtain an assignment of the Lease and agreements of sublease from the Bankrupt and to agree with the Bankrupt and Trustee with respect to the matters hereinafter set forth.

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NOW, THEREFORE, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

FIRST. The Bankrupt hereby assigns to MICHAEL MONTAGUE any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth, including any and all of the right, title and interest of

748 the Bankrupt in and to the rents accrued and to accrue, from and after November 1, 1932, under said agreements of sublease.

SECOND. The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after November 1, 1932, less (a) the costs and expenses incurred by it as Receiver and/or
749 Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

THIRD. The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the
750 provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt.

FOURTH. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby

assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store). 751 752

FIFTH. The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and has not assumed and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise. The Landlord and the 753

754 Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not affect in any manner the full force and validity of the rejection of the Lease by the Trustee.

RIDER

Nothing in this ARTICLE 5 shall be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled, but this shall not be deemed
755 to render any claim a provable claim which is not otherwise such or to relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance.

Attached to and forming part of Assignment Agreement dated November 29th, 1932 by and between Irving Trust Company, Trustee, and United Cigar Stores Company of America.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment Agreement, or
756 caused the same to be duly executed in their respective names, all as of the day and year first above written.

(Signatures.)

Trustee's Exhibit 1, April 29, 1935.

SCHEDULE OF SUBLEASES: 757

Tenant—Frank Goldy & Jack Goldy. Premises—Store #1. Expiration date—July 30, 1935.

Tenant—Dave Frinkel. Premises—Store #4. Expiration date—July 30, 1935.

Tenant—Morris Schwartz. Premises—Store #6. Expiration date—Monthly tenancy.

Tenant—George Moraitis. Premises—Store #7. Expiration date—July 30, 1935.

Tenant—Aaron M. Hirsh. Premises—Store #8. Expiration date—July 30, 1935.

Tenant—Alexander A. Roseff. Premises—Store #9. Expiration date—July 30, 1935. 758

Tenant—Morris Schwartz. Premises—Entire 2nd & 3rd Floors. Expiration date—July 29, 1935.

Acknowledgment of H. G. Wolff as Vice-President of United Cigar Stores Company of America on December 10, 1932 before Elizabeth Meehan, Notary Public, Illinois.

Acknowledgment of Joseph T. Stearns as Assistant Secretary of Irving Trust Company as Trustee in Bankruptcy on December 16, 1932 before Alma Berger, Notary Public, Queens County. 759

Acknowledgment of Michael Montague on December 8, 1932 before Israel Dordik, Notary Public, Illinois.

Trustee's Exhibit 2, April 29, 1935.

(Marked in evidence at folio 945.)

760

IRVING TRUST COMPANY

Trustee in Bankruptcy

for

UNITED CIGAR STORES COMPANY OF AMERICA

625 Madison Avenue
At Fifty-Ninth Street
New York, N. Y.

ACK January 4th, 1933

Mr. Michael Montague,
761 4936 Forrestville Avenue,
Chicago, Illinois.

Dear Sir:—

Re: Lease No. 241

We are returning herewith copy of executed Assignment Agreement dated November 29th, 1932, made between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Michael Montague and United Cigar Stores Company of America, covering premises N/W corner Cottage Grove Avenue and 39th Street, Chicago, Ill.

762 We are also enclosing herewith the following lease and subleases:—

Lease dated March 4th, 1920 made between Michael Montague and Thomas Montague and United Cigar Stores Company of America.

Sublease dated April 18th, 1932 to Frank Goldy and Jack Goldy.

Sublease dated June 9th, 1930 to John Layin, together with amendment agreements.

Sublease dated February 3rd, 1932 to Morris Schwartz, together with amendment agreement.

Trustee's Exhibit 2, April 29, 1935.

Sublease dated December 3rd, 1931 to Morris 763
Schwartz.

Sublease dated March 4th, 1929 to George Moraitis, together with amendment agreements, etc.

Sublease dated October 23rd, 1923 to Aaron M. Hirsh, together with amendment agreements.

Sublease dated July 30th, 1932 to Alexander A. Roseff.

Kindly acknowledge receipt.

Yours very truly,

IRVING TRUST COMPANY,
as Trustee in Bankruptcy for United 764
Cigar Stores Company of America
By E. PAUL PHILLIPS
E. PAUL PHILLIPS

Registered mail
encl.

Received the above mentioned instruments

MICHAEL MONTAGUE

Dated January 20th, 1933

765

Minutes of March 4, 1935.

766

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

(In Bankruptcy.)

No. 59886.

In the matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

767

Before:—IRWIN KURTZ, ESQ., *Special Master.*

Hearing on objection to claim of Trustees for Joseph E. Otis estate and Land Trust, No. 5219. Proceeded pursuant to notice.

APPEARANCES:

Messrs. CRAVATH, DEGERSDORFF, SWAINE & WOOD, Attorneys for the Trustee, by R. L. Gilpatric,
768 Esq., of Counsel;

Messrs. GILBERT, DIAMOND & BRANDIES, Attorneys for Trustees of Joseph E. Otis Estate and Land Trust, Claimant, by Milton Diamond, Esq., of Counsel;

M. CARL LEVINE, ESQ., Attorney for Jacob Ruppert Realty Corporation, Intervenor, by David Morgulas, Esq., of Counsel;

769

Messrs. MITCHELL, TAYLOR, CAPRON & MARSH, Attorney for Landlords' Protective Committee, by Ralph Montgomery Arkush, Esq., and Henry L. Glenn, Esq., of Counsel;

Messrs. SULLIVAN & CROMWELL, Attorneys for United Stores Corporation, by Alexander M. Grean, Jr., Esq., of Counsel;

Messrs. DAVIS, POLK, WARDWELL, GARDINER & REED, Attorneys for Debenture-holders' Protective Committee, by Edward R. Wardwell, Jr., Esq., of Counsel;

770

Messrs. SHEARMAN & STERLING, Attorneys for Preferred Stockholders' Protective Committee, by Douglas Steimle, Esq., of Counsel;

Messrs. SMYTH & TUTTLE, Attorneys for Trustee of Cigar Stores Realty Holdings, Inc., by Nathan A. Smyth, Esq., of Counsel;

MR. HUGH STRINGHAM, Representing the Irving Trust Company, Trustee;

MR. GEORGE WISE, Representative of the Debtor. 771

Minutes of April 1, 1935.

772

(Adjourned Hearing.)

(Same Appearances.)

HUGH STRINGHAM, a witness called in behalf of the Trustee, resumed the stand:

Cross examination by Mr. Diamond:

Q. Mr. Stringham, what is your connection with the United Cigar Stores Company, the debtor in this proceeding? A. I am an employee of the
773 Irving Trust Company in their receivership department and my duties are the administration of bankrupt estates for which the Irving Trust Company is trustee, and in that capacity I have had charge of the estate of the United Cigar Stores since its bankruptcy.

Q. You functioned in the same capacity under the bankruptcy proceedings, didn't you? A. Yes, sir.

Q. You remember when you were assigned to represent the interests of the Irving Trust Company in the bankruptcy proceedings? A. Yes.

Q. Do you remember when? A. Immediately
774 at the filing of the petition in bankruptcy and the appointment of the receiver.

The Master: August 29, 1932.
The Witness: Yes.

Q. At the time of the filing of the petition in bankruptcy by the bankrupt how many retail locations did the bankrupt have? A. It had at the time of the filing of the——. At the time of the filing of the petition in bankruptcy?

Q. Yes, sir. A. Approximately about eight hundred.

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Q. When did you, if at all, have any discussions for the first time with reference to negotiations that were to be conducted with landlords of those locations? A. Shortly after we took possession of the assets of the estate.

Q. With whom were those discussions had? A. They were had with our own counsel, Cravath, deGersdorff, Swaine & Wood, and with executives and employees of the bankrupt.

Q. Will you name the executives and employees? A. Judge Wise, who has charge of the real estate department, Mr. A. C. Allen, Mr. Howard Moffatt, 776
Mr. J. P. McNamara, the comptroller, Mr. J. C. Miller employed in the real estate department, and then several other junior executives around the offices of the United Cigar Stores.

Q. Did any of those people subsequently become employees of the Irving Trust Company? A. Practically all of them became employees.

Q. At what time? A. Immediately upon our taking possession of the assets. They automatically became employees of the trustee.

Q. First of the receiver and then of the trustee? A. Yes, sir.

Q. And have all those people whose names you 777
have mentioned that are still functioning, been continued as employees by the debtor in this proceeding? A. The majority of them. Some of them have left.

Q. At the time of these first discussions with reference to negotiations with landlords do you know if there was in existence any plan of discussion or negotiation with any of them? A. Will you state that question again?

The Master: Read it.

778 Q. (Preceding question is read by the reporter.) A. No. I would like to make an additional statement there: When we got in we went ahead and made our own survey of the business; in other words, one of the first things we would do upon taking possession of an estate of this kind is to make a thorough investigation of the present condition of the business, what the past condition of the business has been and chiefly why the business is bankrupt, why it is in the condition that we find it.

779 Now, from experience that we had had with other chain stores it was reasonable to believe, even before we made an investigation, that excessive rentals was one of the troubles of this business. Therefore, we immediately proceeded to make an analysis along this line and this was done together with our counsel, as I previously stated, and together with other employees of the trust company.

The Master: As a matter of fact you had a contact with this business before the United failure by reason of the failure of the Retail

780 Chemists and the United Stores failure; in both of those cases the Irving Trust Company was trustee, wasn't it?

The Witness: Yes, sir. Now, within the first few weeks, in fact I think the job was done in probably two weeks, we had an analysis of every lease made and the pertinent facts briefly set down in a record from which we adopted our policy as to how we would administer this estate.

Q. Who prepared the various forms or docu-

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ments that were subsequently used in carrying out negotiations with landlords? A. Our own counsel.

Q. Do you know when that was done? A. It was done within the first thirty days; in other words, there was considerable thought and time spent in the drawing of these documents and in the study of the situation which the documents had to cover.

Q. How many different forms were prepared? A. There were five different forms prepared.

Q. Will you describe them, please? A. Yes. There was one form that we called the Brown form. 782

Mr. Gilpatric: May I interject if you have copies of these here why don't you refer to them.

The Witness: Yes, I have copies right here. (After referring to same.) To get these forms clearly I might explain after we had made our analysis and our survey we decided that it was the excessive rentals that were being paid that had caused the trouble that this business was in. We decided that there were one or two alternatives to follow as a 783 policy of the receiver and of the trustee: One would be to immediately liquidate the business, wind it up, sell the assets; the other would be to attempt to preserve the business as a going concern.

The only way that it would be possible to preserve this business as a going concern would be to retain that portion of the retail units that could be operated at a profit; in other words, that portion of the retail units where the sales justified, providing that we

784 could get a reasonable rental, a continuation of those units.

After devoting considerable thought to that and discussing it with our counsel, we decided that that was the policy for the trustee to follow, to salvage this business, by trying to get these rents down where we could retain a considerable number of these retail units.

We also found another condition that there were a large number of leases where we did not operate stores at all. The leases had been
785 purchased more as an investment and were wholly sublet. The subleases were badly in arrears. It had been necessary to grant reductions on a great many of the rentals of these subleases, and this operation whereby properties had been leased and subleased in almost every case each individual lease was being operated at a loss, and this was a tremendous loss on the business.

Therefore, in addition to our policy of attempting to salvage as much of the chain as we could as a merchandising business, we also decided to abandon the real estate operation
786 of this business, so to speak; in other words, to abandon all of these burdensome leases that had nothing whatever to do with the operation of the business, but which were simply a drain on the business.

Now to carry out these policies we worked out these forms. You will recall we had practically one thousand of these leases to abandon within a short time; we had about two months' time within which to either make these new deals or reject the leases. In order to do that we concluded that the most efficient

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way would be to draw these forms that would fit the various cases that we had to deal with and organize our staff so that we could do this work on what you might call a mass production basis, and we even went so far when we drew the forms to have them of different colors, as you will see here, so that when they went through this machinery that we set up on this job that simply by the color you could almost determine what type of lease it was.

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Now, there had been a large number of stores closed by the bankrupt prior to the bankruptcy. First we had what we call the brown form. The purpose of this form was to preserve single stores, no subletting; and we were to do this by having the lease assigned to State companies which had been organized prior to the bankruptcy. When this lease was assigned to the State Company it would be modified and the trustee would arrange in this same brown form to pay the amount of rent of the new lease as long as it remained in possession of the premises. In other words, this brown form served as a new lease with the State Company and also as a use and occupancy agreement by the trustee. We availed ourselves of a new company to make these permanent leases, because in the event of reorganization, there would be a permanent lease in existence and it would eliminate the necessity of going out and retrading and making new leases.

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This brown form (producing same) is the one I have just described.

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Mr. Diamond: May we have them marked, please.

The Master: Mark it.

(Document is received in evidence and marked Claimant's Exhibit 1, of this date.)

The Witness: The next form is what is known as the gray form. This was to handle cases where it was exclusively subletting; in other words, where the United had a lease where they did not have a store and where
791 they were subletting all of the space under this lease.

Mr. Diamond: May we have it marked, please?

(Document is received in evidence and marked Claimant's Exhibit 2, of this date.)

The Witness: The next is a blue form. This was used in cases where there was a store in the premises where the lease covered additional space other than was occupied by
792 the store which we termed a condition of subletting. In those cases we first made a use and occupancy agreement, according to a white form (producing same).

Mr. Diamond: Mark that, please.

(The same is received in evidence and marked Claimant's Exhibit 3, of this date.)

The Witness: The white form and the blue form just referred to, these are really one combination.

Mr. Diamond: Mark that, please.

793

(The same is received in evidence and marked Claimant's Exhibit 4, of this date.)

The Witness: This blue form provided for assignment to the landlord of the portion of the premises not used for the cigar store.

The next form is what was known as the yellow form. This was in the case where we had closed single cigar stores and provided for the assignment of the lease covering that single closed store back to the landlord.

Mr. Diamond: Mark that, please.

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(The same is received in evidence and marked Claimant's Exhibit 5, of this date.)

The Witness: The next form is called the green form. This provided for cases where there was a closed store with subletting in which case this green form assigned back to the landlord the entire premises, including that occupied by the store and also the sublease of the balance of the premises.

Mr. Diamond: Will you mark that, please?

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(The same is received in evidence and marked Claimant's Exhibit 6, of this date.)

Q. Mr. Stringham, which of these forms which you have just described to us and which have been marked in evidence contained provisions pursuant to which the landlord released the United Cigar Stores as bankrupt? A. Every one of them.

Q. (Continuing.) From any claim under the lease? A. Every one of those forms included such a release.

796 Q. Did you consider or were you so advised that the trustee in bankruptcy had any liability under those leases? A. Will you read that back, please?

The Master: Read it.

Q. (Preceding question is read by the reporter.) A. Yes, we always considered what liabilities the trustee has in any connection before we commence the action.

Q. I don't believe you quite understood my question. Did you believe or were you advised
797 that the trustee in bankruptcy was liable to any of the landlords on the leases which were in existence at the time of the bankruptcy? A. We understood that the trustee was not liable.

Q. Do you know when the local State companies were formed which companies subsequently became parties to one or another of the agreements, the forms of which have been offered in evidence? A. They were formed some time prior to bankruptcy; I think during the year 1932. Just when I don't know.

Q. Did you at any time make any inquiry as
798 to the purpose of the formation of those companies? A. Yes, sir.

Q. What did you learn? A. We learned that some time prior to bankruptcy that the bankrupt had contemplated working out a reorganization outside of bankruptcy and that it was contemplated in this plan of reorganization that they would transfer the leases held in various States to companies organized in those States and that these State companies were organized for that purpose.

Q. Do you know if at the time the formation of those local companies agreements substantially

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in the same form as those which you described this morning had also been prepared by the United? A. No, I don't. I never saw any such agreements, never heard of any such agreements.

Q. After determining on a plan following the analysis you made of the locations throughout the country, did you employ any agents for the purpose of visiting the landlords and negotiating new deals with them? A. Yes, we did. As I recall we employed about six or eight; some of these persons having been previously employed by the Irving Trust Company, for the simple reason that there was such a gigantic task to be performed here in such a short time that we needed a large staff to do it.

800

Q. Will you name the men who were employed for that work? A. One man by the name of Moore; I don't recall his initials. McDonald—George McDonald; and Mr. Allen, I don't recall his initials; Mr. Alvin Glover; Mr. Walter Fyfe. I don't recall offhand the other two or three.

Q. Was there a man named Campbell? A. Yes.

Mr. Gilpatric: What was that name; Campbell?

801

The Witness: Yes.

Now, just a minute, was Campbell employed by us, Mr. Phillips?

Mr. Phillips (who was present): Yes, Bruce Campbell.

Q. Were all these people paid by the trustee in bankruptcy for their services? A. They were paid through the trustee in bankruptcy from the assets of the estate which was a custom in bankruptcy where it had a large task such as this to perform.

802 Q. Was there a man named Wolf also in the employ of the trustee? A. Yes, but Wolf was a former employee of the United whom we continued.

Q. And was there a man named Faust who was also in the employ of the Irving Trust Company? A. Yes, he was a former United employee whom we continued.

Mr. Diamond: That is all, Mr. Stringham.

The Master: Does anybody else want to ask any questions of Mr. Stringham?

803 Mr. Gilpatric: Are you through?

The Master: Yes.

Re-direct examination by Mr. Gilpatric:

Q. Mr. Stringham, referring to the policy adopted by the trustee to which you have testified was this dual policy, eliminating the real estate business and keeping the profitable merchandising business, ever communicated to the landlords? A. Yes, it was.

Q. How did you do that; what form did that take? A. By circular letter. In other words, 804 when we decided on how we were going to handle this estate one of the first things we decided was to advise all landlords what we intended to do because we realized there were several hundred landlords throughout the country that were sitting on pins and needles, so to speak, very anxious to find out just what was going to happen and what their status was and what it would do, and we thought we were in duty bound to advise these landlords just as quickly as possible what we contemplated doing.

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Q. Have you copies of those letters with you? A. Yes, here is the first letter; that was on September 22nd.

Mr. Gilpatric: Will you mark it?

The Witness: About three weeks after the inception of the bankruptcy.

The Master: Mark it.

(Letter referred to is received in evidence and marked Trustee's Exhibit A, of this date.)

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Q. Then there was another letter? A. Yes, that was the first letter and we gave them all the information we had at that time.

Then on October 6th we mailed the second letter which sets forth rather completely much of the policy which I have hitherto explained in the testimony.

The Master: Are you offering that letter in evidence?

Mr. Gilpatric: Yes, as the trustee's exhibit.

The Master: Mark it.

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(Paper referred to is received in evidence and marked Trustee's Exhibit B, of this date.)

Q. After these forms of agreement of different colors which have been marked in evidence were drawn up by the trustee, did the trustee ever send out letters describing these agreements and disclosing to landlords their contents? A. Yes, sir.

Q. Have you copies of the letters applicable to the various forms? A. Yes, I have.

808 Q. I have them. A. Have you got a set of them?

Q. (Counsel hands papers to witness.) There were three types of letters, were there not? A. Yes.

Q. I would like you to describe them, as to which forms they are applicable to? A. The first one that——

Q. (Interrupting.) On the first page you will find the symbols. A. This would be the blue form where we assigned the subleases.

809 Mr. Gilpatric: Mark it.

(Paper referred to is received in evidence and marked Trustee's Exhibit C, of this date.)

Mr. Diamond: Have you a copy for me, Mr. Gilpatric?

Mr. Gilpatric: I just gave it to Mr. Morris.

(Further colloquy off the record.)

The Witness: This second one would be the yellow form where it was a single store.

The Master: Mark it.

810 (Paper produced by the witness is received in evidence and marked Trustee's Exhibit D, of this date.)

The Witness: This is the subletting and the store, the green form.

The Master: Mark it.

(Paper produced by the witness is received in evidence and marked Trustee's Exhibit E, of this date.)

Q. Coming back to these forms of agreement,

811

you testified that in each case there was a release of the bankrupt. Will you state the reason why that provision was inserted? A. Yes, sir. When we decided upon this policy which has been described here we wanted in turning back, first, the sublease to the landlords to give them the benefit of the subleases that existed, and we were advised by our counsel that the only way that it could be done would be by an assignment of the bankrupt, rather by the bankrupt as well as by the trustee. When we approached the bankrupt with this proposal that they should join us in 812
assigning the subleases back to the landlords they advised us that they would only do this providing there be included in the agreement whereby the assignment was made a complete release of the bankrupt.

Q. What happened in the case of a landlord who had a claim for back rent or taxes which had not been paid? A. Well, in that event we instructed our representatives that they could insert a rider which modified this release and gave the landlord the right to prove any claim that he had which was a provable claim in bankruptcy; in other words, the release that the bankrupt 813
required and which was incorporated in these agreements was simply a release for future rent which had no value that amounted to anything because in our bankruptcy practice in the past over a period of years claims for future rent had never been provable.

Q. You speak of instructions to the men who worked for the trustee in negotiating these deals. Were those instructions ever reduced to writing? A. Yes, sir.

Q. Have you a copy of those instructions? A. Yes, sir (producing same).

814 Mr. Gilpatric: The trustee offers that in evidence.

Mr. Diamond: I would like to examine that before it is marked.

The Master: Off the record I might state——

(Informal discussion off the record.)

Mr. Diamond: I object to this paper being marked in evidence upon the ground that it is not binding upon the claimant or any of the claimants represented here this morning.

815 Mr. Gilpatric: Let me ask a further question before that objection is ruled on.

Q. Were these instructions handed out to all men retained by the trustee to handle the work in negotiating these documents? A. Yes, sir, they were handed out to them and they were gone over with them personally.

Q. And this is one of the original sets of instructions prepared? A. Yes, sir, that is one of the originals.

The Master: Objection overruled.

816 Mr. Diamond: Exception, please.

(Paper referred to is received in evidence and marked, "Trustee's Exhibit F", of this date.)

Mr. Gilpatric: That is all I have to ask Mr. Stringham.

Re-cross examination by Mr. Diamond:

Q. Mr. Stringham, was it the practice of the trustee to treat all landlords alike on the ques-

817

tion of general policy? A. Yes, that was the purpose of the trustee.

Q. And was that purpose communicated to the agents who were sent out in the field to negotiate with landlords? A. Yes, I think it was, because the instructions given to all agents was to disclose completely all the facts in connection with any of the negotiations.

Q. Were the agents instructed to communicate to the landlords that all landlords would be treated alike on questions of policy? A. I think so, yes.

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I would like to amplify that: You will find in the circular letters that have been previously referred to here we did say in each case—and this point will also be found incorporated in the letter of instructions—that we took this position because different sets of facts existed in connection with the different leases; that the landlord was to make his own decision and that the trustee beyond giving him the facts was making no recommendation as to what the landlord's action should be in any of these matters.

Q. That is in addition and not in qualification of your previous statement, that all landlords were accorded the same treatment—this last statement of yours? A. Well, I would say it was in addition.

819

Q. In discussing the matter with the bankrupt as you testified you did, with whom did you talk?

Mr. Morgulas: I think Mr. Stringham testified he discussed it with his counsel.

The Master: He has already answered the question you have just asked him, Mr. Diamond. He testified he talked with Mr. A. C. Allen, Mr. Moffett and others.

820 A. Judge Wise.

Q. Judge Wise did not represent the bankrupt at that time, did he, Mr. Stringham?

The Master: Let's not have any play on words; the trustee and the bankrupt were one and the same at that time.

Mr. Diamond: I submit, Mr. Special Master, that Mr. Stringham did make a distinction in testifying in relation to the arrangements discussed with the bankrupt as distinguished from the arrangements discussed
821 with the Irving Trust Company and its counsel in the matter of getting releases from landlords, and why the United Cigar Stores as distinguished from the Irving Trust Company insisted upon those releases.

The Master: That is true, but you made the distinction, and Mr. Stringham did not, between the employees of the United and the employees of the trustee because they were one and the same after the bankruptcy.

Mr. Diamond: Then I want that to appear on the record, as to that treatment as well.

822 The Master: What was the last question?

Q. (Preceding question is read by the reporter, "In discussing the matter with the bankrupt as you testified you did, with whom did you talk?") A. With former officers of the bankrupt who became employees of the trustee.

Q. All those people were at the time you discussed these matters employees of the trustee? A. Yes, they were.

Mr. Diamond: That is all.

The Witness: I might say that we also

823

discussed this with the counsel for the bankrupt.

Q. Who is that? A. Sullivan & Cromwell.

Q. Who in that firm? A. Mr. Norris Darrell.

Q. When were those discussions had? A. Within the first few days after bankruptcy; during the time that these plans and policy were being formulated.

Mr. Diamond: All right, that is all.

The Master: Anybody else? Mr. Morgulas? Does any other counsel want to ask Mr. Stringham any questions? (No response.) All right, you are excused, Mr. Stringham. 824

HUGH STRINGHAM, resumed the stand:

Re-direct examination by Mr. Kellogg:

Q. Who on behalf of the bankrupt company advised you that the bankrupt company would not execute an assignment of a lease or subleases unless a release was obtained running to the bankrupt company on a claim of the landlord? A. I think it was Mr. Norris Darrell of Sullivan & Cromwell. 825

Mr. Kellogg: That is all.

The Master: Any other questions, Mr. Diamond?

Mr. Diamond: No.

The Master: Now this matter is closed.

Mr. Crossman: May I ask you to wait just a second, Mr. Special Master?

The Master: Yes.

(Further discussion off the record.)

Minutes of April 2, 1935.

826

(Adjourned hearing—Same appearances.)

The Master: Off the record.

(Informal discussion off the record.)

Minutes of Claim No. 5304 (Abe Schwartz, et ano.).

The Master: Claim No. 5304: Abe Schwartz and Myrtle Schwartz, his wife; amount of claim $62,626.08.

(Further discussion off the record.)

827 Mr. Gilpatric: The trustee offers in evidence in this claim assignment agreement dated November 14, 1932; together with a letter, copy of a letter, transmitting such agreement to the claimant from the trustee, dated December 17, 1932.

(Documents are received in evidence and marked, Trustee's Exhibit 1 and Trustee's Exhibit 2 (3), of this date.)

Mr. Gilpatric: May I say that I would like a stipulation from claimant's counsel that Mr. Stringham's testimony of yesterday in toto be
828 made a part of this case. I suggest that it be stipulated that in case of an appeal in this claim or any other claim he agree to take out of the record of the other case and made a part of this claim so much of the testimony as covers this case.

The Master: There is no objection on the part of counsel for the claimant in that, is there?

Mr. Diamond: No, we join in it.

Mr. Kellogg: That is satisfactory to us.

Mr. Gilpatric: I would like to call Mr. Grean.

ALEXANDER M. GREAN, JR., a witness called in behalf of the Trustee, having been first duly sworn by the Master, testified as follows: 829

Direct examination by Mr. Gilpatric:

Q. Mr. Grean, are you an attorney associated with the firm of Sullivan & Cromwell? A. I am.

Q. How long have you been connected with that firm? A. About five years.

Q. Was that firm counsel for United Cigar Stores Company of America in 1932? A. We were. Prior to the bankruptcy we were general counsel for United Cigar Stores Company of 830 America and subsidiary and affiliated companies.

Q. Did your firm continue to advise the company after its bankruptcy? A. We did.

Q. Did you hear the testimony given by Mr. Stringham yesterday? A. Yes.

Q. Are you familiar with these forms of assignment agreements which were put in evidence during this testimony? A. I am.

Q. Did the officials of the bankrupt submit to you these forms before signing them on behalf of the bankrupt? A. Subsequent to the bankruptcy, as I stated before, we continued to advise the company and its directors and officers with 831 respect to various problems that came up. If you recall, we cooperated with the trustee in an effort to have the trustee find out where all the assets were—not that any were concealed—or readily ascertained.

Mr. Diamond: I move that that be stricken out.

The Master: Strike it out.

The Witness: I voluntarily withdraw it. We cooperated with the trustee and natu-

832 rally as various problems came up we consulted with the trustee.

One of the problems that came up was the matter of dealing with landlords which was described yesterday by Mr. Stringham and at the time these various forms were being prepared members or representatives of Sullivan & Cromwell sat in on the various conferences that were held.

Q. Were you one of those? A. I did; and various officers and directors of the bankrupt
833 requested our advice as to the forms and as to the attitude of the bankrupt with respect to such forms.

Q. What was your advice to the bankrupt with regard to the signing by the bankrupt of these assignment agreements?

Mr. Diamond: I object to that, if your Honor please, as not binding upon the claimant.

The Master: Objection overruled.

Mr. Diamond: Exception.

834 A. After considering the matter with the bankrupt——

Mr. Diamond (interrupting). Just a minute. Is Mr. Grean testifying with regard to this particular claim?

Mr. Gilpatric: He is testifying with regard to the form used in this particular claim.

Mr. Diamond: Unless you connect it with this particular claim, unless Mr. Grean is

835 in a position to do so, I object to the introduction of the testimony.

The Master: For the sake of convenience, in order to make a record on which a possible appeal can be taken, I am going to permit Mr. Grean to testify as to the general course of procedure outlined and the advice that he gave his client in conjunction with these claims.

Objection overruled.

Mr. Diamond: Exception.

836 The Witness: Will you repeat that question again?

The Master: Read it.

(Question is read by the reporter, "What was your advice to the bankrupt with regard to the signing by the bankrupt of these assignment agreements?")

837 The Witness: We felt that when the trustee decided that a lease was burdensome and planned to reject it or did reject it, that the lease reverted to the bankrupt and that it was up to the bankrupt to dispose of that lease. We felt furthermore— Pardon me, was that responsive to your question?

Q. Let me ask a further question: When these assignment agreements were submitted to the bankrupt for signature did they consult you as to whether they should sign? A. They did not consult us with respect to each one, but they consulted us with respect to those forms which Mr. Stringham discussed yesterday, as to whether or not they should be signed by officers of the corporation.

Q. And what did you advise them when they discussed the forms? A. We advised them that

838 the bankrupt by executing these forms was giving up something of value to the landlord; for example, in the cases of sublettings it was desirable for the landlord——

Mr. Diamond (interrupting): I do not want to interrupt Mr. Grean but I assume that the objection I made to the previous question will be considered to have been made with regard to all subsequent questions along these lines?

The Master: The same ruling and an ex-
839 ception in each case. I want the court up above to have a full picture of the entire matter and for that reason, and for that reason only, I am admitting it. It may not be entirely relevant as far as this particular claim is concerned, but I assume it is going to be used and offered in all of the other claims.

Mr. Diamond: I maintain it is not relevant to any of the claims.

The Master: You have your exception, sir.

(Informal discussion off the record.)

Q. Mr. Grean, will you state what your firm
840 advised the officers of the bankrupt when they asked you whether they should sign this blue form of agreement and the other forms containing the releases?

Mr. Diamond: I object to that question as being too vague and indefinite. I think a time and place should be indicated and the names of the persons who participated should be specified.

The Master: Objection sustained.

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Q. Do you recall at what time these forms of agreement were submitted to you in the bankruptcy? A. During the latter part of September, 1932; perhaps, the first week in October—to the best of my recollection.

Q. With whom did you discuss these forms on behalf of the bankrupt? A. I discussed these forms with Mr. Wise, vice-president of the bankrupt.

Q. Was that at the same time that these were submitted to you, the latter part of September? A. That was at the time that these forms were in draft form, as I recall it.

842

Q. And what did you tell Judge Wise at that time? A. I told Judge Wise that the bankrupt should not sign any of these agreements unless they obtained a release from the landlords on any claims against the bankrupt.

Q. Does what you have said apply to all five of these forms of assignment agreements? A. It applies to all those forms which have that release clause in and I believe it is true every one of those forms has such a release clause.

Q. And which provided for the assignment of the lease and certain fixtures back to the landlord? A. Yes.

843

Cross examination by Mr. Diamond:

Q. At the time that you had this conversation with Judge Wise, Judge Wise was an employee of the Irving Trust Company, was he not? A. I believe that Judge Wise was an employee but likewise was vice-president of the bankrupt.

Q. Don't you know that he was devoting his time exclusively to the organization of the Irving

844 Trust Company as trustee of the United Cigar Stores Company of America and was being paid by the Irving Trust Company? A. That is so, but he was still vice-president of the bankrupt and he had the right to ask us for advice.

Mr. Diamond: I move to strike out the latter part of the answer.

The Master: Strike out the latter part.

(Colloquy off the record.)

845 Q. Mr. Grean, did your firm have anything to do with the formation of local State companies of the United Cigar Stores Company? A. Yes, we did.

Q. Did your firm represent the United Cigar Stores in the formation of those companies? A. Yes, sir.

Q. Do you know when that occurred? A. Oh, I should say five or six months prior to the bankruptcy.

Q. Did you sit in at any conferences with officers and directors of the United as a result of which it was decided to form those companies?

846 A. I am afraid I will have to decline to answer that question on the ground that it is confidential matter.

Mr. Diamond: I submit, your Honor, whatever privilege the witness claims has already been waived as a result of his voluntarily taking the stand and testifying.

Mr. Gilpatric: He did not voluntarily take the stand; I called him.

The Master: Off the record.

(Informal discussion off the record.)

847

The Master: Objection overruled. It seems to me having opened the door, having testified to some of the conversation had with a client, they cannot now shut it on cross examination.

Mr. Gilpatric: Exception.

The Witness: I would be glad to testify as to any conversation with respect to this release question, anything surrounding it; but I think matters that happened long prior to that change are in no way connected with it.

848

Mr. Diamond: The formation of the State companies is very definitely connected with it.

(Further discussion off the record.)

The Master: I am going to permit the examination of the witness subject to connection. If it is not connected, then I will listen to a motion to strike it out. I think, however, on the question of privilege he has waived it by taking the stand and answering the questions which he did answer in relation to Mr. Gilpatric's direct examination.

(Further discussion off the record.) 849

The Master: Answer the question.

The Witness: Would you mind repeating that again?

Q. (Question is read by the reporter, "Did you sit in at any conferences with officers and directors of the United as a result of which it was decided to form those companies?") A. I did.

Q. With which of the officers and directors of the company? A. Mr. A. C. Allen, Judge Wise, Mr. W. A. Ferguson. Those are all of the officers that I can recall at the present time.

850 Q. Were any other representatives of the United Cigar Stores Company involved in any of those discussions? A. I naturally discussed the formation of those companies with all of the members of the legal staff.

Q. Of the United Cigar Stores? A. Yes.

Q. With any of the stockholders or bondholders of that company? A. No, sir.

Q. During what period of time did those discussions take place? A. As I recall it, they commenced about seven or eight months preceding the bankruptcy.

851 Q. And continued how long? A. You mean the discussion with reference to the formation of the State companies.

Q. That is right? A. They continued until the State companies were formed.

Q. And that was when? A. As I testified before, they were organized over a time commencing let us say eight months prior to the bankruptcy and for two or three months thereafter.

Q. During the course of those conversations was anything said about the negotiations with landlords of the various locations occupied by

852 United Cigar Stores? A. There had been discussions about negotiations with landlords for several years prior to that.

Q. I refer particularly to the discussions with reference to the formation of the State companies and ask whether during the time that those discussions were had anything was said about negotiations with landlords or treatment of landlords who had United Cigar Stores locations. A. It was contemplated that the United Cigar Stores business in various States would be transferred to these subsidiary corporations, all of whose stock

853

would be owned by United Cigar Stores Company of America.

Q. Was anything discussed at that time about a plan which would involve obtaining releases from the landlords of these various locations? A. Absolutely not.

Q. So far as you know? A. So far as I know.

Q. What was the purpose of the formation of these companies, the various State companies?

The Master: He has already testified to that. They proposed to transfer the business in the various States to these companies.

854

Q. What was the reason for that, Mr. Grean?

Mr. Gilpatric: You mean the reason for the transfer of the business?

Mr. Diamond: Yes.

A. I might say the business was never transferred with the possible exception of United Cigar Stores Delaware Corporation.

Q. What was transferred to these local companies? A. Nothing was transferred.

Q. What was the total capitalization—what was the capitalization of each of those companies? A. I do not recall each one, but it depended in great part upon the assets that were contemplated to be transferred and we also had in view the saving of taxes in various States also.

855

Q. Isn't it a fact that each one of these local companies was organized with a nominal capital? A. May I ask do you mean authorized capital stock or issued?

Q. Actually paid in? A. As I recall it, only a nominal sum was paid in in most of the cases, possibly $1,000.

856 *Alexander M. Grean, Jr.—for Trustee—Recalled—Direct.*

Q. Isn't it a fact that in no case did the amount paid in exceed $1,000? A. In the case of the United Cigar Stores Delaware Corporation which I don't consider a State company there certainly was a larger amount paid in. With respect to the strictly State companies, I don't recall.

Mr. Diamond: No further questions.

Mr. Gilpatric: I now move to strike out all of the testimony elucidated by Mr. Diamond's questioning on the ground that no con-
857 nection has been shown between this claim and the purpose for which these companies was formed.

Mr. Diamond: The very use of these companies after the bankruptcy speaks louder than anything Mr. Green could have told us on the stand.

Mr. Gilpatric: We never transferred any of the business to those companies.

The Master: Objection overruled.

Mr. Gilpatric: Exception.

The Master: Is that the trustee's case?

Mr. Gilpatric: That is all I have on
858 direct.

Mr. Kellogg: May I ask Mr. Grean one or two questions?

The Master: Yes, Mr. Grean recalled.

Direct examination by Mr. Kellogg:

Q. I hand you Trustee's Exhibit 1 in this claim and ask you if that is a copy of one of the forms as to which you advised the bankrupt or the United Cigar Stores Company? A. (After examining same.) This seems to be one of those forms.

859

Mr. Kellogg: That is all.

Mr. Diamond: Then I want to inquire about that.

Cross examination by Mr. Diamond:

Q. Mr. Grean, did you understand Mr. Kellogg's question to refer to this exhibit as a form or as a copy of a document that you had seen before? A. I understood him to refer to that as an executed photostatic copy or executed counterpart of the form with which I was familiar.

860

Q. Do I understand you to say that you recall having seen a document executed dated the 14th day of November, made between the United Cigar Stores and the trustee and the State company and Abe Schwartz and Myrtle Schwartz, his wife? A. No, sir.

Q. Then you did understand Mr. Kellogg's question to refer to this document as a form document as distinguished from a copy of an executed paper? A. Yes, sir.

Re-direct examination by Mr. Kellogg:

Q. It is one of the forms, Mr. Grean, with respect to which you advised the United Cigar Stores Company of America? A. Yes.

861

Mr. Diamond: Mr. Gilpatric, this photostatic copy does not of necessity show the physical position of the rider in relation to the document. Will you permit—will you put on the record, please, a description of where that rider is attached?

Mr. Gilpatric: Referring to Mr. Diamond's inquiry, the rider commencing with the words,

862 *Alexander M. Grean, Jr.—for Trustee—Recalled—Re-direct.*

"Nothing in this article 5" and then following—(interrupted by).

Mr. Diamond: And entitled "rider".

Mr. Gilpatric (continuing): And entitled "rider" is attached on the original of the document in the middle of the second page.

The Master: It being on a white slip.

Mr. Diamond: Attached to one of the blue forms.

Mr. Gilpatric: I want to ask Mr. Grean one more question.

863 Re-direct examination by Mr. Gilpatric:

Q. Mr. Grean, when you referred to the forms of the documents which were submitted to you in order that the bankrupt might be advised as to its conduct in connection with these documents, did you include the form of rider which was adopted by the trustee, reserving provable claims and which was inserted when the trustee was requested for such rider? A. Did I understand your question to mean did we include such a rider in the form?

864 Q. Was the form of this rider also submitted to you with other forms? A. Yes, sir.

Mr. Gilpatric: All right.

The Master: Any other examination of Mr. Grean?

(No response.)

(Thereupon, the witness was excused.)

Minutes of Claim No. 5277 (Munk).

The Master: The next case is 5277, filed by William E. Munk and Warren H. Munk, in the sum of $46,707.33.

865

Mr. Gilpatric: The trustee offers in evidence assignment agreement dated November 29, 1932 with the request for leave to substitute a photostatic copy and the following correspondence between the trustee and the claimant: Letter dated November 9, 1932 addressed to the trustee by claimant's counsel, Messrs. Smith, Ramster, Hornbrook & Smith, of Indianapolis, Indiana; the trustee's reply dated November 19th; a further letter from the trustee dated November 23rd; reply from claimants' counsel dated November 28th and its enclosure; trustee's letter of transmittal dated December 17, 1932 and a letter from the claimant personally dated December 19, 1933.

866

Mr. Diamond: As to this photostatic copy, will you be kind enough to indicate the physical position of the rider?

Mr. Gilpatric: I will put in the original.

The Master: Let it appear that it is on a white sheet of paper attached at the place where the fifth paragraph appears attached to the blue blank and affixed to it by a fastener.

867

Mr. Gilpatric: I might point out in all of these photostats you can see the clip mark.

(Papers referred to received in evidence and marked, Trustee's Exhibit 3 to Trustee's Exhibit 13, inclusive, of this date.)

(Discussion off the record.)

The Master: Now, Mr. Kellogg, will you state your position?

Mr. Kellogg: It is hereby stipulated and agreed that in connection with claim No. 5304 and other claims in the reorganization pro-

868 ceeding, that any proof of claim and the disposition of the claim or any other part of the record in the bankruptcy proceedings may be referred to by any counsel for the claimants or trustee, the debtor or any intervenors and so on.

Mr. Diamond: As though it were a part of the record in any one of those claims?

Mr. Kellogg: Yes.

The Master: All right.

Mr. Kellogg: That includes, Mr. Diamond,
869 any comment also that any claimant had failed to avail himself or had not filed any claim in the bankruptcy proceedings.

Mr. Diamond: Well, if it wasn't there it wasn't there. That is all. I can't prevent you from commenting on the fact that a claimant had not filed in bankruptcy.

Mr. Kellogg: I just want to feel perfectly free to make any such comment.

The Master: Then as I understand it going back now to 5277, the trustee has completed its case?

Mr. Gilpatric: On the direct, yes.

870 Mr. Diamond: I shall call Mr. Munk.

WILLIAM EDWARD MUNK, a witness called on behalf of the claimants, having been first duly sworn by the Special Master, testified as follows:

Direct examination by Mr. Diamond:

Q. Are you one of the owners of the property at the northwest corner of Walnut and Charles Street in the City of Muncie, Indiana? A. I am.

Q. Who is Warren H. Munk? A. My brother.

Q. The property is owned by you and your brother? A. Yes.

871

Q. Did you own that property in August of 1932? A. We did.

Q. And did you have a lease with the United Cigar Stores for a portion of that property? A. We had, for all of the property.

Q. When did you learn of the bankruptcy of the United Cigar Stores? A. I would say about August, 1932.

Q. At the end of August, 1932? A. Somewhere around there.

Q. When did you have any talk for the first time after the bankruptcy with anybody representing the receiver or the trustee in bankruptcy? 872
A. Well, sometime between the time I heard of the bankruptcy and, I would say, about September, 1932, and a man—a gentleman by the name of Mr. Hirsch came down as representative of the United Cigar Stores or the trustee, I don't remember which; and we went over the general situation with him. Of course, everybody admitted there was a bankruptcy and he agreed to go over Monday with me and look over the property. We got over there and we found that they had let several of our tenants get away from us. At least in one case the tenant told me that the 873
United Cigar had refused to answer their letters about a reduction in rent and, of course, the rents were extremely high that the tenants were paying so several of them just moved out and left the landlord holding the bag.

Q. When did you have a discussion with anybody representing the trustee in bankruptcy of the United Cigar Stores with reference to the making of a new lease covering that property? A. Sometime before October 1, 1932 and I have a letter there that says on October 1st we wrote them about it.

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Q. With whom did you have that talk? A. A gentleman by the name of Mr. Schmetzer.

Q. Was Mr. Hirsch also present? A. No, Mr. Hirsch, as I remember, did not come down on this trip.

Q. What did Mr. Schmetzer say about the making of a new lease for that property? A. He made us some sort of a proposition which we did not accept. May I see my letter of October 1st which you have in your file there? That covers that. This letter covers the matter so may I read this?

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Q. Let me see it a minute.

(Letter handed to counsel.)

Mr. Diamond: Is there any objection to this letter? I do not think it was covered by your notice to produce.

Mr. Gilpatric: You also did not notify me that Mr. Schmetzer and Mr. Hirsch were brought into this. I have no objection otherwise.

Mr. Diamond: I offer this letter.

876

(Letter referred to received in evidence and marked, Claimant's Exhibit A, of this date.)

Mr. Diamond: I assume there is no dispute that Mr. Hirsch and Mr. Schmetzer were employees of the Irving Trust Company as trustee in bankruptcy of United Cigar Stores in the latter part of 1932.

(Letter read.)

Q. What was the conversation that you had with Mr. Schmetzer? A. Well, it was sort of a general conversation. We all understood, of course, that the United was bankrupt and Mr.

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Schmetzer, as I remember it, said it would take about two years for them to get things straightened out and in the meantime they were going to give up the stores that were not paying and keep those that paid, and evidently our store had been doing pretty well over there and they wanted to make a separate lease for the corner store. They had formerly had a lease for the entire building and I believe the thirteen tenants—there were thirteen—there should have been.

Q. Did you finally enter—or agree to make a lease with the trustee in bankruptcy for the corner store? A. We did not make any definite agreement until the lease was signed as I remember it.

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Q. Had you agreed on terms prior to the receipt of a new lease from the trustee in bankruptcy? A. We dickered with them for quite a while. We made them this offer which they did not accept and then we finally agreed to a minimum of $158.33 for the first three months starting September 1, 1932 and $133.33 for the balance of the term per month of the two-year lease, and the reason why it was more for the first three months was because they had collected some guarantee from one of our tenants and just wanted to balance it off that way, and then for the last—after the lease had run part of the two years Mr. Schmetzer came to see us and said that they were probably going to have to close the store unless we reduced the minimum to $100 a month and naturally that would deteriorate our property, we felt, and we agreed to that $100 minimum for the balance of the term of this two year lease which called for a minimum of $133.33.

879

Q. When did you receive the form of the new

880 lease from Mr. Schmetzer? A. I could not say that.

Q. Did you at any time have any discussion with Mr. Schmetzer about the release clause that was contained in the new agreement that was sent to you by the trustee? A. We carried on—at least all these important conversations—in the office of Smith, Ramster, Hornbrook & Smith, Mr. H. H. Hornbrook being our attorney and when this was submitted to us finally it took quite a while for it to come over, as I remember it,
881 and Mr. Hornbrook would not, of course, advise us to sign that as it was, and as I remember the facts he suggested a clause protecting us from liability on the subleases up until the time we took over the property and also provided that we would have a chance to prove any provable claims against the bankrupt.

Now, Mr. Schmetzer——

Q. Pardon me just a minute. When did that discussion take place? A. I believe not until we received this form. Mr. Schmetzer came with them.

Q. And up until the time you received the form
882 and the time they were signed by you—this talk was had between the time you got these forms and the time they were signed? A. Of course, yes. Mr. Schmetzer did not feel qualified to accept this waiver clause and as I remember it he called the Chicago office on the long distance and he talked to either Mr. Wolff or Mr. Faust. I think Mr. Faust because he is the legal man and our attorney, Mr. Hornbrook talked to either Mr. Wolff or Mr. Faust and agreed on the clause that is in there at the present which was initialed by my brother and myself and by Mr. Schmetzer and by Mr. Wolf.

883

Q. Had you received any rent from the Irving Trust Company or any one else representing the United Cigar Stores during the months of September and October? A. We did not receive a cent of rent from any of those people—we got our August rent for 1932—we did not receive another letter—I mean, another remittance from them until a check for $187 which was sent with their letter of November 15, 1932 and which I have entered on my books here as of November 18, 1932.

884

Mr. Diamond: That is all.

The Master: Any cross examination?

Mr. Gilpatric: I have no questions.

Mr. Morgulas: I have nothing.

Cross examination by Mr. Kellogg:

Q. Did you file any claim in the bankruptcy proceeding against the United Cigar Stores estate? A. We did not, no.

Q. You did not conceive that you had any claim——

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Mr. Diamond: I object to that.

The master: Well, why not wait until he finishes the question. Go ahead and finish your question.

Q. You did not conceive that you had any claim against the bankrupt—against the United Cigar Stores Company which might be allowed in the bankruptcy proceeding?

Mr. Diamond: I object to that as incompetent and calling for a conclusion.

The Master: Objection sustained.

Mr. Kellogg: That is all.

886 The Master: Have you any other testimony in this case?

Mr. Diamond: No, nothing more.

The Master: Do you want to take up the matter of the ownership of the claim? I will recall Mr. Munk.

WILLIAM EDWARD MUNK, resumed the stand:

Examination by the Special Master:

887 Q. Mr. Munk, are you and your brother the present owners of this claim? A. We are.

Q. Have you always been the owners of it? A. Well, my father and mother died in September, 1931 and we were the sole hears to the estate but otherwise, why, my brother and I have always owned it.

Q. You have never assigned any part of it? A. No, sir.

Cross examination by Mr. Morgulas:

Q. Have you entered into any agreement with Mr. Harrison with respect to this claim? A. I did.

888 Q. Is that agreement in writing? A. Yes.

Q. Have you that agreement with you? A. I have.

Mr. Morgulas: May I have it, please?

(Agreement produced.)

Mr. Diamond: There is a penciled notation on this paper which was not on there at the time of execution by Mr. Munk.

The Witness: It was just put on there as a memorandum.

Mr. Morgulas: Is the notation pertinent to this matter?

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Mr. Diamond: It is not part of it.

Mr. Morgulas: That notation may become pertinent to this inquiry.

The Master: You say that you made this notation after?

The Witness: I just made it after I got here yesterday or the day before.

Mr. Morgulas: I may want to offer that penciled notation in evidence.

The Master: I do not think you will. However, I do not think that I ought to order it erased without giving counsel an opportunity to look at it, at least.

890

Mr. Diamond: I object to the paper being received in evidence. It is not part of this claim at all or the hearing on the objections to this claim.

The Master: Have you any objection to counsel looking at it?

Mr. Diamond: Yes. We have a stipulation here as to the procedure to be followed for the purpose of convincing intervenors' counsel as to the arrangements that exist between claimants and Mr. Harrison.

891

Mr. Morgulas: There was no stipulation as far as I am concerned. Mr. Diamond may think so but there is no stipulation on the point at all.

The Master: I am going to permit counsel to look at this as it is in its present form.

Mr. Morgulas: I offer that in evidence.

Mr. Arkush: Can't it be read? It will save some time.

Mr. Diamond: I do not think that ought to be read. It is a private arrangement between counsel and his client and unless this

892 document has any bearing or affects the claim that we have been trying I object to its being offered in evidence and very clearly from the face of it it appears that has no bearing on an assignment of any part of the claim, which is the only purpose for which this paper is being offered.

The Master: I am curious to know how this is relevant, Mr. Morgulas. It appears on its face to be a pure and simple contingent retainer agreement between counsel and his client.

893 Mr. Gilpatric: No one knows what Congress meant, as far as I know, by that language about the scrutinization of claims and arrangements between agents, committees and so forth in buying or soliciting claims. It seems to me we ought to reserve that question for the time being. If it has the effect that Mr. Diamond says it has, and I am not challenging his statement for the moment, I do not see why we can't put it in.

Mr. Diamond: The only question we are trying at the moment is the question of the

894 release, what effect it has on this release.

Mr. Morgulas: In connection with what Mr. Gilpatric has said there are interlineations in ink which may have a distinct bearing in connection with the matter which Mr. Gilpatric has brought up.

Mr. Arkush: May I look at that?

Mr. Diamond: I object to that document being handed around. I still insist that it is a private paper that relates to an arrangement between client and attorney and it is not a proper part of the proof in this case.

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I object to it on the further ground that the only question that is being tried at this time, in this or any of the other cases, is the question of the effect of the release, so-called, full or qualified, on the validity of these claims.

The Master: That is true. That last objection is a good objection except that for the convenience of your client I myself put him back on the stand and asked him those questions and that is how this paper is now offered in evidence. That being so—(interrupted by)

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Mr. Gilpatric: If you care to produce that later when this question comes up—(interrupted by)

Mr. Diamond: I will be glad to produce it.

The Master: Then with the understanding that this particular contract and any others in any one of these cases are to be produced later at the request of counsel when and if it becomes necessary to take up this particular point I will not receive this document at the present time.

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Mr. Diamond: May I have it back?

The Master: Yes.

Mr. Morgulas: May my offer then be deemed to have been made and the decision reserved on whether you will admit it or not?

The Master: That will be held in abeyance until the time I take up this question which is involved.

Q. Mr. Munk, is there any other agreement that you have with respect to the disposition of this claim or the proceeds of the claim? A. No.

Colloquy of Counsel.

898

The Master: Is that all?

Mr. Morgulas: Yes.

Mr. Diamond: I have nothing further.

The Master: Then the same disposition in this case as in the Otis case.

The Master: The next one is 5286.

Mr. Diamond: Will you note the appearance of: Max Petacque, associate counsel, appearing for the claimant.

Minutes of Claim No. 5286 (Simon Lorch).

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The Master: This is claim No. 5286 and is filed by Mr. Simon Lorch in the sum of $107,941.99.

Mr. Gilpatric: The trustee offers in evidence as documentary proof an assignment agreement dated October 19, 1932, with leave to substitute a photostatic copy. The typewritten rider—the rider attached to page 2 of the agreement is on white paper and is referred to in the body of the agreement as "rider as attached hereat".

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The trustee also offers a letter of transmittal dated December 17, 1932, addressed to the claimant and two letters from claimant's counsel dated November 22nd and December 3, 1932.

(Papers referred to received in evidence and marked, Trustee's Exhibit 14 to Trustee's Exhibit 17, inclusive, of this date.)

(Letters read.)

Mr. Gilpatric: I rest.

MAX PETACQUE, a witness called in behalf of the Claimant, having been first duly sworn by the Special Master, testified as follows: 901

Direct examination by Mr. Diamond:

Q. Mr. Petacque, you are an attorney admitted to practice in the State of Illinois? A. I am.

Q. And you are the attorney for Simon Lorch, the claimant herein? A. I am and have been for the past ten years.

Q. Do you know that Mr. Lorch is the owner of the property at the southeast corner of Belmont and Lincoln Avenues, Chicago? A. Yes, sir.

Q. Did the United Cigar Stores have a lease covering that property in August of 1932? A. It did. 902

Q. When did you learn of the bankruptcy of the United Cigar Stores? A. Mr. Lorch and I learned of the bankruptcy of the United Cigar Stores through, I believe, an item appearing in the public press.

Q. When did you have any discussion with any one representing the United Cigar Stores with reference to a modification of this lease? A. I telephoned the office of the United Cigar Stores immediately upon hearing of the filing of the bankruptcy proceedings and asked for Mr. Wolff. 903 Mr. Wolff at the time of this call was out of the city and I did not contact with him until September 7, 1932. At the time Mr. Lorch and I went over to the office of the United Cigar Stores and engaged in conversation with Mr. Wolff and Mr. George Faust, who was legal counsel for the company.

Q. But at that time acting for the trustee? A. I believe so. I said to Mr. Wolff, "Harry, what is this all about", and he said, "Well", he said,

904 "just what I told you a long time ago was going to happen has happened. I told you a long time ago if the company could not get some adjustment of its leases it would have to go through the wringer and it is going through now, and as you know it has got to get rid of some of these very burdensome leases. I said to him, "I am very much surprised, Harry, to find that the company is in bankruptcy in view of the fact that this financial statement which I have was issued by your company as of December 31, 1931, certified
905 by Price, Waterhouse—(interrupted by)

Mr. Gilpatric: May I ask what all this talk is about?

The Master: He is stating part of the conversation which he had with him. Go ahead.

The Witness: Certified by Price, Waterhouse & Company says that the company on the date of the issuance of that statement had a capital net worth of approximately $9,000,000". He said, "Well, you know, I am not familiar with those matters at all, all I can tell you is that the United Cigar Stores Company isn't going to engage in the real estate
906 business any more, we are going to get rid of our lease transactions and we are going to stay in the cigar business." I told him that as far as we were concerned we would insist that our lease was in full force and effect, that we considered the trustee liable for the payment of rent thereunder and that we would expect a check for the amount of the rent stipulated to be paid under the lease. He said then that the whole matter was in such a chaotic condition, the bankruptcy proceeding having

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been recently filed that he wasn't in a position to discuss the matter any more definitely and that he would communicate with me later when there was something more definite that could be made the subject of discussion.

Q. At the time of the talk did you have in your possession the statement of the United Cigar Stores Company as of December 31, 1931 certified by Price, Waterhouse & Company? A. This was a printed copy—this was the specific document which I took with me at the time (indicating).

908

Mr. Diamond: I offer that.

Mr. Gilpatric: I object to that as having no bearing on the matter we are trying.

The Master: Objection sustained.

Mr. Diamond: Exception. I ask that it be marked for identification.

The Master: Mark it.

(Paper referred to marked Claimant's Exhibit B for Identification, of this date).

The Witness: On September 14, 1932, we again attended at the office of the United Cigar Stores Company and had a discussion about the situation with Mr. Moffatt, a gentleman whom I had not theretofore met and who had come on from New York, and Mr. Wolf. Mr. Moffatt, I understand, was in some way connected or at this time was working for the trustee. Mr. Moffatt was insistent that the only sort of proposition that the trustee would be interested in would be a lease for the corner store and we told him that we were not interested in making any such proposition. I was then told by Mr. Moffatt and Mr. Wolff that a representative

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910 of the Irving Trust was coming on from Chicago and that upon the arrival of this representative that Mr. Wolff would communicate with me again.

On September 25, 1932, I attended at the offices of the United Cigar Stores Company in Chicago and there were present on this occasion Mr. Fyfe, Mr. Wolff, Mr. Faust and Mr. Rosenthal who, I understood was the then president of the Whelan Drug Stores.

Mr. Gilpatric: May I ask what you are
911 refreshing your recollection from?

The Witness: From a time charge card memorandum which we keep in our office upon which I do, when I do it, note the record of the time spent for our clients.

By the Master:

Q. Were those entries made by you? A. Those entries are dictated by me and entered thereon by my secretary.

By Mr. Diamond:

Q. Will you continue, Mr. Petacque, please? A.
912 We then engaged in a lengthy discussion about the entire situation and I told them that I was not ready to believe that the United Cigar Stores Company was actually in bankruptcy, that my feeling in the matter was that the whole set-up was simply a scheming device for the purpose of giving the company a means or plan to rid itself of these burdensome leases; that this whole proposition was a method that simply had been concocted, that I knew for some period of time theretofore the United Cigar Stores had been asking landlords for modifications or cancellations or changes in leases—(interrupted by)

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Mr. Gilpatric: Unless Mr. Petacque remembers this conversation word for word I object to the elaboration of his ideas.

The Master: He said that, as I understand it, to these gentlemen.

The Witness: That is right.

The Master: Objection overruled.

The Witness: I told them that as far as I was concerned that we would not be prepared to enter into any agreement unless it would be with a certain express understanding, one of which was that the failure would continue 914
in force, another of which was that all claims of the landlords against the bankrupt estate are to be reserved and, a third one was, that the new company, which was to get a lease for the corner store would have to assume the payment of all taxes which were then accrued against the property. Mr. Fyfe told me that he would communicate with his superiors in New York and advise me as to what their attitude would be.

Q. Did you subsequently hear from Mr. Fyfe? A. Yes, I did, and I had a number of talks with 915
Mr. Fyfe while he was trying to ascertain the policy of the home office which took considerable time and I kept on insisting that the rent for the premises be paid. That I thought it was—I told them that I thought it was totally unfair for the trustees to collect the rent from our subtenants, at that time, the trustee was occupying only a small portion of the entire premises and was collecting our rent, and we had our obligations to pay and it was necessary for us to get them. Finally, on November 5, 1932, no definite response having then been received from the home office or

916 having been communicated to us, I proceeded with Mr. Fyfe on behalf of the trustee and Mr. Lorch to enter into the agreement dated November 5, 1932, of which this is a copy.

Mr. Diamond: I offer this paper in evidence.

The Witness: I might add the words "Final draft" are not—they are in my handwriting. They did not appear on the document on the date of its execution.

Mr. Gilpatric: I have no objection to this
917 offer with the reservation that I may compare that with the original copy in our files?

The Master: Yes, and subject to any objection that you may make after your comparison.

Mr. Diamond: And if you find that this document does not conform with the original in the files of the trustee.

(Paper referred to received in evidence and marked, Claimant's Exhibit C, of this date.)

Q. When did you next have any discussion on the state of this property and the lease with the
918 United. A. We had a number of discussions subsequently thereto with reference to the condition of the property, tenancies, subtenancies and so on, but the next discussion pertaining to the execution of these documents was held on November 20, 1932.

Q. Where? A. At the office of the United Cigar Stores Company.

Q. Who was present? A. Mr. Faust, Mr. Wolff and I should say that was on the 21st. The documents arrived at my office—they were sent over by their office on the 20th and I was there on the 21st regarding them.

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I made an examination of the assignment document and found that the document contained a provision purporting to release the bankrupt and its trustee of all claims, this not being in accordance with the discussion, the discussions I had with Mr. Fyfe and which I have previously related, and I went to the office of the United Cigar Stores Company and said that under no circumstances would I permit Mr. Lorch as my client to execute this document in its then form.

Mr. Faust and Mr. Wolff, working rather closely together, I could not possibly identify which said which, but between the two of them, one or the other said that the landlords, after all, did not have any claims against the estate and the only claim he could possibly have was a claim for taxes and they were willing to protect us on the taxes but we ought to waive any other sort of a claim inasmuch as I, as a lawyer, they said, knew that the landlords could have no other claims. I said to them that early in my practice of the law I made a number of mistakes by trying to guess all the answers to a situation and I was not going to try to guess all the answers to this situation, a situation so highly involved, knowing there were all sorts of allegations of fraud in connection with the filing of this proceeding, I did not know what was going to happen, whether the company was going to go through with it or whether the company was going to reorganize and I wanted to reserve the right to file any claims which might arise depending upon future circumstances. We had a very considerable discussion over this matter and we finally agreed upon the clause such as appears in the instrument. There were other reservations that were discussed which appear in the rider

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921

922 with reference to indemnity bond for taxes which had been filed and also an expressed agreement covering the assignment of this underlying lease and these subleases.

Q. The special clauses which appear as a rider attached to the agreement of October 19, 1932 were prepared as a result of discussions that you had to which you have just testified and submitted to the representative of the Irving Trust Company as trustee of the United Cigar Stores Company in bankruptcy? A. They were.

923 Mr. Diamond: That is all I have.

Cross examination by Mr. Gilpatric:

Q. Mr. Petacque, during the early part of your conversations with Mr. Fyfe which included, as I understand it, some with Mr. Wolff and with Mr. Faust, you were insisting that your taxes or the allowance of your tax claim be a condition precedent to the execution of this assignment agreement? A. Not as a condition precedent to our entering into a new lease with the trustee under the assignment agreement. I wanted the new corporation to undertake to pay the taxes; I not
924 knowing just exactly what amount this estate would pay I wanted to have the new corporation or its local State corporation to assume the payment of taxes as a condition of our entering into a new lease with this local company.

Q. Didn't you also ask that the trustee agree not to contest your tax claim that you filed in bankruptcy? A. Yes, we did ask them to do that and as a result of that I, being told that the trustee could not enter into such an arrangement, the device was used of incorporating in the clause a cancellation clause giving the lessor the option to

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cancel so that if they proceeded in bad faith we would be in a position to cancel the lease and we had a general understanding that if the company complied with its arrangement we would comply with ours.

Q. Did you file a tax claim? A. I did.

Q. And was that claim allowed? A. It was.

Q. Did you file any claim for future rent— A. I did not.

Q. How do you reconcile your statement that you wanted to save all claims against the reorganized company or in case the bankruptcy was 926
set aside for fraud, with the language of this reservation which only refers to provable claims in bankruptcy? A. In this way: At the time of the filing of this claim the same state of affairs continued to exist so far as I knew.

Q. The filing of what claim? A. The claim for taxes.

Q. I am asking about this assignment agreement, the form of this reservation. A. I don't understand your question.

Q. I asked you how you reconciled your statement that you were reserving or wanted to reserve when you agreed to this reservation any kind of 927
claim you might have against the bankrupt whether or not in or out of bankruptcy in case the bankruptcy was set aside on the ground of fraud and whether or not the company was reorganized when this agreement which you signed only refers to bankruptcy claims and claims allowed in the bankruptcy proceedings? A. Well, that is all we would be liable for if the bankruptcy continued in force. My theory was that I could not answer the question if the bankruptcy continued in force and could not answer the question

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if something happened to the bankruptcy proceeding. I did not claim to have magical foresight in this entire situation.

Q. So that all you wanted to reserve were your claims in the bankruptcy court?

Mr. Diamond: I object to the question on the ground that the document speaks for itself.

The Master: Objection sustained.

Mr. Gilpatric: I have no further questions. That is all I have.

928 The Master: Any further testimony in this case?

Mr. Diamond: I will call Mr. Lorch.

SIMON LORCH, the claimant, called as a witness in his own behalf, having been first duly sworn by the Master, testified as follows:

Direct examination by Mr. Diamond:

Q. Where do you live, Mr. Lorch? A. Chicago.

Q. The address, please? A. The Hotel Belmont.

Q. Are you the owner of the property at the southeast corner of Belmont and Lincoln Avenues,

930 Chicago? A. I am, yes, sir.

Q. Were you the owner of that property in August of 1932? A. Yes, sir.

Q. And are still the owner of the property today? A. Yes, sir.

Q. Did you at any time make an assignment of your claim against this estate to anybody? A. To nobody.

Q. And have you always owned and do you still own that claim? A. Still own it, yes, sir.

Mr. Diamond: That is all.

Mr. Gilpatric: No cross examination.

Minutes of April 2, 1935.

Colloquy of Counsel.

931

Mr. Morgulas: I have no cross examination.

The Master: The same disposition in this as in the Otis case.

Mr. Diamond: Before we go to the next case I suppose we really have that stipulation without repeating it, that the testimony of Mr. Stringham is deemed to be a part of this record and that we have made the same offer with regard to the testimony of Mr. Fyfe and also may we understand that the testimony of Mr. Grean is also a part of this record because it was upon that theory that Mr. Grean was called. 932

Mr. Gilpatric: I have no objection.

Mr. Morgulas: With the same reservation to the stipulation as before.

Mr. Diamond: Let us understand, now, that that applies to all the cases.

The Master: Exactly.

Mr. Diamond: So that I do not have to repeat that each time.

The Master: Yes. There is no necessity for counsel to repeat it.

Mr. Kellogg: That was my understanding. 933

Minutes of Claim No. 5421 (J. E. Nunn).

The Master: The next claim is claim No. 5421 claim of J. E. Nunn, filed in the $33,696.35.

(R. F. Dart, Esq., Associate counsel for the claimant.)

Mr. Dart: If your Honor please, I would like to make the suggestion formally now that our motion to strike from our proof of claim and otherwise to amend be adjourned and

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held in abeyance pending the decision on your part or the part of the Appellate Court on this release question. I would like to make that suggestion with the understanding that there will be no prejudice as a result thereof as far as the claim is concerned.

The Master: That seems to me a sensible way to handle the situation, if there is no objection.

Mr. Gilpatric: No objection.

Mr. Morgulas: I have no objection.

935 The Master: The understanding is, then, that the motion which has been made to amend will be adjourned to a date one week after the final determination of the highest court to which this matter may be taken on the question of release of this claim.

Mr. Dart: And that is without prejudice?

The Master: Without prejudice to either side.

Mr. Gilpatric: Now, in this claim the trustee offers in evidence assignment agreement dated November 22, 1932, together with a letter of transmittal of such agreement to

936 the claimant; the rider attached to the agreement is designated as such, is on white paper and is attached to the agreement in the middle of the second page.

(Papers referred to received in evidence and marked, Trustee's Exhibit 18 and Trustee's Exhibit 19 of this date.)

With that the trustee rests.

Mr. Diamond: That is all. We rest on the trustee's case.

Minutes of April 2, 1935.

Colloquy of Counsel.

937

(Informal discussion off the record.)

Minutes of Claim No. 5235 (Fred O. Excell, et al.).

The Master: Claim No. 5235: claim of Roy E. Bensley, Fred O. Excell and Stuart W. Excell, as trustees under the last will and testament of Robert Excell, deceased; the amount of the claim is $28,382.92.

Let me call your attention to something off the record.

(Informal discussion off the record.)

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Mr. Gilpatric: May I state preliminarily that the trustee has objected to this claim on two grounds: one is the execution of a qualified release, and the second is the fact that the lease upon which this claim is based was cancelled by merger as a result of the following circumstances: the United's landlord, Michael Montague, quit-claimed all of his interest in the leased premises to the claimants on December 10, 1932. So far as we know there was never any assignment of a lease; it was simply a merger of the over-lease, the ground lease with the fee ownership by this transfer.

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Mr. Morris: We received a wire from Attorney Rosenstein who represents the claimant who turned the same over to us. He was supposed to be here this morning and he had all of the original documents with him. We received the telegram late this morning that he could not come and wanted the matter adjourned.

Mr. Gilpatric: Why don't we defer that part of the objection?

The Master: No, I will adjourn the whole claim.

Colloquy of Counsel.

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Mr. Morris: I think I can have him here when you adjourn it.

The Master: I prefer to adjourn it to the 29th at 10 o'clock.

(Thereupon, the matter was adjourned to April 29, 1935, at 10 o'clock, A. M.)

Minutes of Claim No. 5302 (Whitcomb).

The Master: Claim No. 5302: claim of Louise S. Whitcomb and Florence Welsh; the amount of
941 the claim is $12,661.11.

(Informal discussion off the record.)

Mr. Gilpatric: The trustee offers as its formal proof assignment agreement dated December 3, 1932. The rider attached to the original is on white paper, it is designated as "rider" and is attached to the middle of the second page.

The trustee also offers two letters addressed to the claimants, dated January 19th and January 20, 1933, respectively; and a letter addressed to the trustee by the claimants' counsel dated January 27, 1933.

942 The Master: You ask leave to substitute a photostatic copy in place and stead of the original?

Mr. Gilpatric: Yes, your Honor.

(Documents referred to are received in evidence and marked, respectively, Trustee's Exhibit 34, Trustee's Exhibit 35, Trustee's Exhibit 36 (Lot) and Trustee's Exhibit 37, of this date.)

Mr. Gilpatric: The trustee rests.

Mr. Diamond: The claimant rests.

Minutes of April 29, 1935.

943

(Adjourned Hearing on Claim of Excell Trustees, No. 5235.)

(Same Appearances.)

The Master: This is claim No. 5235, Roy E. Bensley, Fred O. Excell and Stuart W. Excell, as trustees under the last will and testament of Robert Excell, deceased, filed in the sum of $28,382.92 with interest.

This was originally on for March 29th.

Mr. Gilpatric: The trustee objects to this claim on two grounds.

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In support of the objection going to the qualified release, the trustee offers in evidence an assignment agreement dated November 29, 1932, between the trustee in bankruptcy, the debtor and the landlord under the lease upon which this claim is based and asks leave to substitute a photostatic copy therefor.

For the record I might say that the rider on the original is typewritten on white paper and attached by staples to the middle of the second page following the fifth paragraph in the amended form.

945

(Paper referred to received in evidence and marked, Trustee's Exhibit 1, of this date.)

Mr. Gilpatric: I also offer in evidence a letter dated January 4, 1933 addressed to said landlord by the trustee and bearing the landlord's receipt.

(Letter referred to received in evidence and marked, Trustee's Exhibit 2, of this date.)

Mr. Gilpatric: Coming to the second ground

946 of the objection to this claim, that is, the termination of the lease upon which this claim was based, the trustee would like to offer in evidence a lease dated August 1, 1905, between Charlotte Excell and others, as trustees under the last will of Robert Excell to Michael Montague.

Mr. Diamond: Do you offer the underlining in red?

Mr. Gilpatric: No, I do not offer the pencil notations or the underlining. I offer that subject to check.

947 (Paper referred to received in evidence and marked, Trustee's Exhibit 3, of this date.)

Mr. Gilpatric: The trustee also offers a lease dated March 4, 1920 between Michael Montague and Thomas Montague and the debtor.

Mr. Diamond: There is some correspondence in here. You are not offering that, are you, Mr. Gilpatric?

Mr. Gilpatric: No, the letters attached to this lease are not being offered.

948 (Paper referred to received in evidence and marked, Trustee's Exhibit 4, of this date.)

Mr. Gilpatric: The trustee next offers a certified copy of an instrument dated November 10, 1932, whereunder Thomas Montague and Michael Montague purported to convey and quit-claim to the claimants in this proceeding the property which is the subject of this claim.

949

(Paper referred to received in evidence and marked, Trustee's Exhibit 5, of this date.)

Mr. Gilpatric: The trustee next offers an instrument dated December 10, 1932, by Michael Montague which purports to assign to the claimants his right under a lease dated November 29, 1932. This is a copy. I haven't the original. I offer that subject to check.

(Paper referred to received in evidence and marked, Trustee's Exhibit 6, of this date.)

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Mr. Gilpatric: I now ask the attorney for the claimant to produce an agreement entered into at the time of this transfer of title to the property on December 10, 1932.

(Paper produced.)

Mr. Gilpatric: I offer that.

(Paper referred to received in evidence and marked, Trustee's Exhibit 7, of this date.)

Mr. Gilpatric: I rest.

Mr. Diamond: The claimant rests.

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The Master: The same disposition in this as in the Otis case.

(Thereupon, at 10:30 o'clock, A. M., the hearing was closed.)

Statement Regarding Retainers Executed by Claimants.

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At the trial of these claims before the Special Master several of the claimants were questioned concerning their ownership of the claims. Several witnesses were questioned about the retainers between the claimants and the attorneys of record. The appellants contend that these original agreements are not now in issue or relevant to the issue of the validity of the releases and accordingly are not properly a part of the record.

In order to expedite the appeal, and without the appellants in any way conceding the materiality or propriety of including these retainers as a part of this record, there follows a summary analysis of the retainers executed by some of the claimants who are parties to this appeal:

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(a) Two of the claimants executed no written retainers;

(b) Four of these claimants entered into retainer arrangements through ordinary correspondence.

(c) Three of the claimants executed retainer agreements.

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The retainers were made directly with the claimants or with the personal attorneys for the claimants. The retainers provided for contingency fees ranging from 10% to 33⅓%. In some cases the fee is to be divided with claimant's local counsel. Four of the claimants provided in the retainers that there be no charges other than the contingent fee provided therein.

The originals of any of the retainers may be offered at the argument of this appeal as physical exhibits subject to the appellants' contention set forth in the foregoing statement.

Stipulation in Lieu of Printing Certain Exhibits.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the information contained in Schedule A attached hereto shall be considered part of the record in this proceeding and that the following be admitted to be facts for all purposes of this appeal:

Of the 9 claimants involved in this appeal to the Circuit Court of Appeals who executed so-called "qualified releases", three filed no claims at all in the prior bankruptcy proceedings, and six filed claims in the prior bankruptcy proceedings.

Claimants who filed no claim in prior bankruptcy proceedings:

Reorganization Claim No.	Claimant
5277	William E. Munk, et al.
5406	Herbert Livingston, et al.
5341	Thomas H. Brown, et al.

Claimants who filed claims in prior bankruptcy proceedings:

Reorganization Claim No.	Bankruptcy Claim No.	Claimant	Nature of Claim	Disposition
5235	273	Excell Trustees	Taxes accrued but not payable by Debtor prior to bankruptcy	Allowed in part
5286	2958	Simon Lorch	Same as No. 5235	Allowed in part

Stipulation in Lieu of Printing Certain Exhibits.

Reorganization Claim No.	Bankruptcy Claim No.	Claimant	Nature of Claim	Disposition
5302	269	Louise S. Whitcomb and Florence Welch	Same as No. 5235	Allowed in part
	270		Future rent	Expunged
5304	1915	Abe and Myrtle Schwartz	Same as No. 5235	Allowed
5312	2105	Isidor A. and Flora L. Rubel	Same as No. 5235	Allowed in part
5421	1929	J. E. Nunn	Same as No. 5235	Allowed in part

The following claims were submitted on the pleadings, the claimant's proof of claim, the trustee's objections, the Trustee's Exhibits and the testimony of Hugh Stringham and Alexander M. Grean, Jr.:

Claims No. 5304, 5421, 5406, 5341, 5312, 5302, 5235.

Dated, New York, January 6th, 1936.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Claimants.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Trustee.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

Schedule A, Annexed to Stipulation.

SHEARMAN & STERLING
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders Protective Committee.

SCHEDULE A, ANNEXED TO STIPULATION.

QUALIFIED RELEASE CLAIMS.

Claim No.	Name of Claimant	Lease rejected by Trustee	Store Continued	Type of Assignment Agreement	Amount of Claim	State of Origin
235	Excell Trustees	Yes	Yes	Blue Form	$28,382.92	Illinois
277	Wm. E. and Warren H. Munk	Yes	Yes	Blue Form	46,707.33	Indiana
286	Simon Lorch	No	Yes	Blue Form	107,941.99	Illinois
302	Louise S. Whitcomb and Florence Welch	Yes	Yes	Blue Form	12,661.11	Michigan
304	Abe and Myrtle Schwartz	No	Yes	Blue Form	62,626.08	Illinois
312	Isidor A. and Flora L. Rubel	No	Yes	Blue Form	49,127.33	Illinois
341	Thos. H. Brown et al.	Yes	Closed after bankruptcy	Green Form	103,917.10	Massachusetts
406	Herbert and Sigmund Livingston, as Trustees	Yes	Yes	Blue Form (typewritten)	24,567.36	Illinois
421	J. E. Nunn	No	Yes	Blue Form	33,696.35	Texas

Special Master's Certificate to District Court.

964 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To the Honorable Judges of the United States District Court, Southern District of New York:

I, IRWIN KURTZ, Special Master herein, make the following report:

1. On August 15, 1935 I made my Report
965 recommending the granting of the application to expunge 95 claims filed herein on behalf of Landlords, by Solomon D. Harrison, Esq., an attorney of Chicago, and his associates, and known herein as the "Harrison Group of Claims", by reason of the releases heretofore executed by the said Landlords.

2. On August 26th, 1935 the Claimants feeling aggrieved thereat filed exceptions to said Report.

3. The Exceptions complained of briefly sum-
966 marized are that (a) the said Report is contrary to the facts and contrary to the law, and (b) that the Special Master erred in finding that there was no misrepresentation by the Trustee, that the said releases were not without consideration, in the interpretation of the qualified releases, and that there was no duress exercised upon the claimants.

4. The respective contentions of the Trustee and the Claimants, as well as the legal questions involved herein are fully set forth in the Special Master's Report dated August 15th, 1935, to which this Court is respectfully referred.

Special Master's Certificate to District Court.

5. I hand up herewith the following: 967

(a) Exceptions to the Special Master's Report.

(b) Special Master's Report dated August 15, 1935.

(c) Trustee's application to expunge.

(d) Stenographic minutes and exhibits.

Dated, New York, August 27, 1935.

IRWIN KURTZ,
Special Master.

968

This Certificate will be on the Bankruptcy Motion Calendar in the District Court on Wednesday September 11th, 1935, at 10:30 A. M.

Notice thereof by mail given to:

GILBERT, DIAMOND & BRANDEIS, ESQS., Attorneys for Claimants, 745 5th Avenue, N. Y. City.

CRAVATH, DEGERSDORFF, SWAIN & WOOD, Attorneys for Trustee, 15 Broad Street, N. Y. City.

ROSENBERG, GOLDMARK & COLIN, Attorneys for Debtor, 165 Broadway, N. Y. City.

M. CARL LEVINE, ESQ., Attorney for Jacob Ruppert 969
Realty Corp., 535 5th Avenue, N. Y. City.

MITCHELL, TAYLOR, CAPRON & MARSH, Attorneys for Landlords Prot. Committee, 20 Exchange Place, N. Y. City.

RALPH MONTGOMERY ARKUSH, Attorney for Landlords' Prot. Com., 15 Broad St., N. Y. City.

SHEARMAN & STERLING, ESQS., Attorneys for Pref. Stockholders Protective Committee, 70 Pine St., N. Y. City.

BERLE & BERLE, Attorneys for Pref. Stockholders' Prot. Com., 70 Pine Street, N. Y. City.

970 DAVIS, POLK, WARDWELL, GARDINER & REED, Attorneys for Debenture Holders Protective Committee, 15 Broad St., N. Y. City.

SULLIVAN & CROMWELL, Attorneys for United Stores Corp. and for Debtor in State Court Actions, 48 Wall St., N. Y. City.

SMYTH & TUTTLE, Attorneys, 40 Wall St., N. Y. City.

Report of Special Master Expunging Claims.

UNITED STATES DISTRICT COURT,

971 SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To the Honorable Judges of the United States District Court, Southern District of New York:

I, IRWIN KURTZ, appointed Special Master herein by the order of Hon. Alfred C. Coxe, *U. S. D. J.*, dated July 17th, 1934, pursuant to paragraph (g) thereof, respectfully report, as follows:

972 Applications have been made to expunge ninety-five (95) claims filed herein on behalf of Landlords by Solomon D. Harrison, Esq., an attorney of Chicago, and his associates, and known herein as the "Harrison Group of Claims". The same objection is made to all these claims by the Trustee and by the intervenors, namely, that all of them were heretofore released by these Landlords in the prior bankruptcy proceeding by general releases executed to the Trustee in Bankruptcy to the Bankrupt. Landlords' counsel, however, contend that these releases were obtained by the

Irving Trust Company, the Trustee in Bankruptcy, improperly, that is, by duress—and that accordingly they should be disregarded in this Debtor proceeding. The Trustee, however, and the Intervenors contend that the present attack on these general releases is without any basis. 973

Upon the hearings had herein, proof was offered as to the general policy of the Trustee in Bankruptcy in its negotiations with the Landlords in the Bankruptcy proceeding as to the rejection of the leases, the execution of new leases, the assignments and modifications of old leases, and as to having the Bankrupt join in the assignments of its interest in leases, after the rejection thereof by the Trustee in Bankruptcy. By stipulation this proof was made applicable to each of the ninety-five (95) claims herein. In addition thereto, testimony was offered by Landlords in twelve (12) cases of the ninety-five (95) herein involved, as to their particular negotiations had which resulted in the execution of the agreement by them with the Trustee and with the Bankrupt, and as to the general release. 974

The situation presented herein is as follows:

On August 29th, 1932 United Cigar Stores Company of America (United) filed its voluntary petition in this District and was adjudicated a Bankrupt. The United was engaged in conducting a chain of over 1,000 retail stores throughout this country for the sale of cigars, cigarettes, and kindred articles. The Irving Trust Company was appointed Receiver, and on September 10th, 1932 it was elected Trustee and immediately obtained the necessary order to continue the business. 975

The Trustee was required to operate this business so as to realize the best possible results with the minimum amount of expense. It was immedi-

976 ately confronted with the important task of ascertaining the exact status of over 1,000 leases herein, so as to determine which should be retained as assets and which should be rejected as burdensome. Naturally, a thorough survey of the situation was required. The Trustee realized that such a survey would take time, and in the interim the Landlords should be informed as to its intention and the situation presented. Accordingly, on September 22nd, 1932 the Trustee issued a circular letter to all the Landlords in which it set forth its position, stated therein that an examination of the leases was then being made, its de-
977 sire to continue those stores which could be operated profitably at a proper rental, that in the meantime, it would pay the rental for the premises occupied and would thereafter turn over collections from subtenants.

This was followed by a supplemental letter about two weeks thereafter, to wit: October 6th, 1932, which fully advised the Landlords as to the Trustee's position more in detail. It contained suggestions as to the possible disposition and revision of old leases, contemplated assignments of leases to local subsidiary corporations, and stated
978 that the Trustee would cooperate as far as it could, so as to enable the Landlords to acquire the Bankrupt's leases with a view to preserving subtenancies, if any.

After the Trustee had completed its investigation as to the lease situation, it was then in a position to determine what action to take as to the leases, namely, which should be rejected absolutely, which should possibly be retained at a lower rental and continued as part of a going business. The Trustee realized that this would require negotiations with the Landlords either by

personal contact through field representatives, if 979
possible, and in other cases by correspondence. The situation confronting the Landlords as to the stores well into two general classifications, (1) those entirely occupied by the Bankrupt, and (2) those partly or wholly sublet by the Bankrupt.

The Trustee's policy was to divorce subletting propositions from the conduct of the business and confine itself solely to the merchandising end of it. Consequently, it determined to negotiate for new leases for stores which would be occupied entirely by the business of the Bankrupt.

It seems that prior to the filing of the peti- 980
tion in bankruptcy, the United had organized corporations in various States as proposed State Operating Companies, but no stores or assets had been transferred to these corporations. All the stock of these State Companies naturally passed to the Trustee in Bankruptcy. In working out its plans and procedure the Trustee decided to avail itself of these companies, and to take the new leases in the name of these companies. The trustee realized that upon rejection of the leases, that they would revert to the Bankrupt. Therefore, in consummating its negotiations with Landlords, whether it be in modification of or in ob- 981
taining new leases, that it would be desirable to extinguish the interest that would revert to the Bankrupt, so that a Landlord would be in an immediate position to conclude its arrangements with the Trustee, and also avoid the unnecessary expense and procedure involved either in an ejectment action or in a dispossess proceeding, to clear the title of this "reverting interest to the Bankrupt".

Accordingly, it requested the Bankrupt to join in the execution of any document which might

982 be necessary to carry out this purpose. The Bankrupt was perfectly willing to do so but insisted that in consideration therefor, that the Bankrupt, as distinguished from the Bankrupt Estate—should be included in all general releases running to the Trustee in Bankruptcy. Thereupon the attorneys for the Trustee prepared the necessary forms for the consummation of all transactions that could be worked out between the Trustee and Landlords. This generally involved either a release to the Irving Trust Company, both as Trustee and individually, a release to the Bankrupt, an assignment by the Bankrupt of
983 its reversionary interest, as aforesaid, and the executing of a new agreement or the modification of the old lease by the Landlord with one of the State Operating Companies, organized as aforesaid, the entire shares of stock of which had passed to the Trustee.

The situation to be provided for by the Trustee was (1) generally as to stores which had been entirely occupied by the Bankrupt; (2) as to stores which had been vacated by the Bankrupt with furniture and fixtures left in the premises: under such circumstances, another provision was
984 added, namely, the assignment and transfer by the Trustee and the Bankrupt of these articles as well; (3) as to stores entirely sublet—this was covered by adding provisions for the assignment of all subleases to the landlord; (4) as to stores partly sublet—in addition to the usual provisions, the forms included the necessary assignment of the subleases. These forms were distinguished by their color, to handle the various situations presented and were printed upon brown, yellow, green, and gray paper, respectively. In addition there was a form (blue and white), to cover a use and occupation agreement by the Trustee.

As stated heretofore, after the Trustee had 985
determined which stores it would carry on if they could be obtained at a reduced rental, and after it had worked out all the procedural details as to the forms of the agreement, it either sent its representatives to the Landlords or communicated with them by mail, as aforesaid. The Trustee issued printed instructions to all its representatives which are in evidence. This distinctly shows that the Landlords were to decide for themselves just what they wished to do. As to these negotiations which could not be had through personal contact with its representatives, the Trustee enclosed to Landlords the printed form of agree- 986
ment, whether it was brown, yellow, green, or gray, depending upon the particular situation.

The degree of negotiations naturally varied with the situations and with the Landlords. Many Landlords refused to make new leases upon a reduced rental, and no negotiations were concluded with them. Others, however, although they were not willing to accept a reduced rental, however, were satisfied to execute the agreements in all other respects, and obtained the benefit of the subtenancies, and extinguishment of the Bankrupt's interest. As a result of all the foregoing, 987
the Trustee did negotiate about six hundred thirty (630) new leases with Landlords upon its forms and pursuant to its terms, as aforesaid.

In a limited number of cases it became necessary to add typewritten riders to the agreement which reserved the right "to prove against the Bankrupt Estate any provable claim to which the Bankruptcy Court may adjudge the Landlords entitled to". This was particularly true in the Chicago area in cases where the landlords had a net lease, namely, where the Bankrupt had

988 agreed to pay the land taxes. The tax situation in Chicago at that time was in a snarl, the amount to be paid by the Bankrupt was uncertain, and naturally the general release was qualified as not to include these taxes or any provable claim which the Landlord then had against the Bankrupt Estate.

Of the 95 claims involved herein, 12 of these are qualified releases, eight of them embrace these tax claims; these riders were inserted whenever requested by a Landlord to qualify the general release so as to exempt any provable claim *then*
989 had by the Landlord. Some of these Landlords requested this insertion to cover themselves upon their claim for future rent. It was well settled at this time that a claim for future rent was not provable in bankruptcy. So much so that many of the Landlords in the Bankruptcy filed no claims. However, some of the Landlords felt that either by reason of the special damage clauses in their leases, or in the event that the Supreme Court thereafter should rule that such a claim for future rent was provable, that they desired to preserve their rights. However, the United States Supreme Court thereafter reaffirmed the
990 existing rule that a claim for future rent was not provable—in *Manhattan Properties, etc.*, 291 U. S. 320 (1934), and also in re Samuel Brown—which was based upon such a claim in the United Bankruptcy proceeding.

All these negotiations by the Trustee with the Landlords were had and consummated in the latter part of 1932. Thereafter the business was carried by the Trustee and three dividends totalling fifty (50%) per cent. were paid involving a disbursement of about Five Million ($5,000,000.) Dollars. Landlords who had not consummated

any negotiations with the Trustee, although they realized that they had no provable claims in Bankruptcy, took an active part in the Bankruptcy procedings, maintained that the Trustee would eventually pay all provable claims in full, and that thereupon they would be able to realize payment in whole or in part of their respective claims. 991

Throughout this time there was not the slightest indication by any of the 95 Landlords herein that their agreements with the Trustee and their releases, either full or qualified, were not in all respects proper, and binding, or that in the event the provable claims were paid, that they would have the right to come in and share with those Landlords who had decided not to negotiate leases for reduced rentals, whose premises had continued vacant, who had refused to execute general releases either to the Trustee or to the Bankrupt, and who had gone to the expense of resorting to legal procedings or otherwise to extinguish the Bankrupt's interest in their leases after the Trustee's rejection thereof. 992

However, it was only when Section 77-B was enacted in June 1934, with the provisions as to the provability of Landlord's claims for future rent, that those 95 Landlords herein become articulate, as to the alleged invalidity of their negotiations with the Trustee and the Bankrupt, resulting in the delivery of their releases, as aforesaid. The opposing brief's comment that this occurred after they had been approached by a representative of the Harrison group, and after a contract of retainer providing, among other things, for a thirty (30%) percent. contingency to the attorneys had been obtained. 993

The Landlords' counsel contend that it is inequi-

994 table to give binding and legal effect to the general (full) releases herein because Section 77-B has now made such claims for future rent provable. Obviously, if the landlords herein in the latter part of 1932 had known, that a year and a half later that Section 77-B would be enacted, it may well be that they would have determined to forego the acceptance of a reduced rental for their premises as a result of the negotiations with the Trustee, and not to release their claims for damages—the same as the other landlords heretofore referred had done.

995 The present desire of the 95 Landlord-Claimants well exemplifies the oft-repeated maxim, that a man's hindsight is better than his foresight. However, a business transaction cannot be wiped out at the desire of a party thereto, because an event occurring thereafter indicates that a more profitable bargain could have been made. Otherwise there would be an end to all contracts and all business relations.

All of the foregoing likewise holds true in the interpretation of the qualified releases herein. These Landlords at no time had in mind future legislation. The qualification was limited to the

996 possibility of the claim for damages for future rent in the pending bankruptcy proceeding being declared provable either by a ruling on their particular covenants or by reason of the United States Supreme Court thereafter upsetting the well-settled rule then in force. If any Landlords on the qualified release had really intended that they should have the right, in the event of the enactment thereafter of legislation, such as Section 77, their failure to provide therefor is their own fault. Courts cannot be called upon to rewrite contracts for the parties. (*Hermitage* v. *Levine*, 248 N. Y. 233).

I granted the motion to exclude the testimony 997
of Walter Fyfe, not because he was a former real estate employee of the Trustee, and was one of its representatives in its negotiations with the Landlords and had thereafter become associated with the Harrison group in the obtaining and filing of the claims herein. The basis therefor was that he was not qualified to state the general policy of the Trustee. However, his testimony as to the Trustee's instructions that all the Landlords were to be treated alike and that the Trustee would vacate if a new agreement were not made, is not in conflict but is in accord with 998
the general policy of the Trustee's negotiations, as testified to by the Trustee's representatives, Mr. Stringham and Mr. Wolf.

Based upon the proof, as aforesaid, of the Trustee's method of procedure and the pro-forma documentary proof in the 83 cases in which no testimony was offered by the Landlords as to the transactions had, it is clear in view of all the foregoing, that the releases herein were properly executed, are valid and binding in all respects, and that the said Landlords have no claim in these proceedings.

Landlords' counsel, however, offered testimony 999
in 12 cases. They urge that the proof therein should also be considered and made applicable to all the 95 claims herein. They argue that the testimony in these 12 claims show the particulars and the details which establish the charges to prove that the policy of the Trustee herein, in making the Bankrupt a party to its forms of agreement herein, and inserting the provisions for release of the Bankrupt was a continuation of a scheme hatched by the United prior to its bankruptcy and successfully carried through by the Trustee by means of a "subtle" duress.

1000 The Landlord's counsel urge that this form of duress consisted of various tactics adopted by the Trustee, namely, by representations that the Bankrupt was hopelessly insolvent; that all landlords would sign this form of agreement without variations; by threats that unless the Landlord signed up, that the stores would be closed up, and that the Trustee withheld payment of rent for the premises until such agreements had been executed.

An analysis, however, of the proof offered in the twelve cases as aforesaid, does not sustain
1001 these charges against the Trustee. For instance, in the Otis Land Trust #5219; in re Zaring #5300; in re Schaeffer #5261; and in re Nierman #5222; in re Lorch #5286—the Landlord consulted his own attorney before executing the agreement. In re Wolf #5307; in re Bloom #5289; and in re Lowenstein #5265—a series of negotiations ensued before the Landlords signed the agreement. In re Wolf #5307 and in re Smulekoff #5405 the Landlord received his rent from the Trustee prior to the execution of the agreement.

It appears from all the testimony that the Land-
1002 lords or their agents were experienced real estate men; that they were aware of the depressed real estate condition existing at the time; that they had previous knowledge of bankruptcy procedure; that they knew that claims for future rents were not provable in bankruptcy, and that the bankruptcy herein was based upon the lease situation; that in their negotiations they consulted with their own attorneys and in certain instances submitted counter-drafts to the Trustee's proposal; that the Landlords, their representatives and attorneys understood the situation and knew exactly

what they were doing when the landlords executed these forms. Moreover, the Landlords had it within their power either to consummate their negotiations or decline to do so, as was done by other Landlords in the proceeding. 1003

Landlords' counsel also argue that it would have been more valuable for the Landlords not to have executed releases for the assignment of the Bankrupt's interest but to have resorted to legal proceedings to extinguish same. Suffice it to say that the Landlords and the attorneys who represented them at their negotiations with the Trustee, quite properly were then of a different opinion. 1004

Landlords' counsel contend that there was no consideration for these releases to the Bankrupt. It is needless to point out that the Bankrupt's willingness to execute all assignments was ample consideration flowing from the Bankrupt irrespective of the fact that the Landlords received the benefit of an immediate extinguishment of the Bankrupt's interest, without the necessity of any further action to clear up the title to their property.

Landlords' counsel maintain that as another indication of the alleged bad faith of the Trustee is the "procedure" of rejecting the leases and thereby causing the same to revert to the Bankrupt, and that on the contrary the Trustee should have affirmed all the leases and then assigned them to the Landlords, thus preventing any interest reverting to the Bankrupt. It is obvious that such a plan of procedure on the part of the Trustee would have been fraught with great danger. The Trustee would have immediately assumed all the obligations of the leases, and particularly all liabilities to subtenants, irrespective of the com- 1005

1006 plicated procedure that would have been required by notice to creditors, hearings, etc. before a "sale of the lease" could be made by the Trustee.

Moreover, if the Trustee had assumed the leases and thus became the tenant of the Landlords, it would have resulted in a general release to the Bankrupt from all liability for rent thereafter. Thus, the net effect would have been that under such circumstances, irrespective of the general releases herein, that the Landlords would have had no claim whatsoever, against the Bankrupt for future rent.

1007 In conclusion, it can only be stated that there was no misrepresentation by the Trustee; that the signing of the agreements herein were optional with the landlords; that the negotiations were consummated after full opportunity had been afforded to the Landlords of an intelligent consideration of the purport and effect of these agreements. Accordingly, all of the claims herein are without basis, and as a matter of law are barred by the very agreements of the parties with their releases, as aforesaid.

The motions to expunge should accordingly be granted in each case. Separate orders on not less
1008 than two days' notice, should be submitted for each of the 95 claims herein.

Respectfully submitted,

IRWIN KURTZ,
Special Master.

Dated, New York, August 15th, 1935.

Order Appealed From.

At a Special Term for Motions of the United States District Court in and for the Southern District of New York, at the Court House thereof in the Borough of Manhattan, City and Southern District of New York, on the 16th day of September, 1935. 1009

Present—HONORABLE ALFRED C. COXE,
United States District Judge.

In the Matter 1010

of

UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation,

Debtor.

On reading and filing the report, dated August 15, 1935, of Honorable Irwin Kurtz, Special Master, recommending that the 95 claims filed herein on behalf of certain landlords of the Debtor by Solomon E. Harrison and others (hereinafter referred to as the Harrison claims) be expunged, the exceptions to said report dated August 26, 1935, and filed herein on behalf of said claimants, the certificate of the Special Master, dated August 27, 1935, certifying to this Court the questions presented by such exceptions, and upon the other documents and papers referred to in said report and certificate, and after hearing Messrs. Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for Irving Trust Company, Trustee of the Estate of the above-named Debtor, by William D. Whitney, Esq., of counsel, in support of the Special Master's report and Messrs. Gilbert, Diamond 1011

1012

& Brandeis, attorneys for said claimants, by Emanuel Feldberg, Esq., of counsel, in opposition thereto, and after due consideration, it is, on motion of counsel for said Trustee,

ORDERED that the report of Honorable Irwin Kurtz, Special Master, dated August 15, 1935, recommending that the Harrison claims be expunged, be and the same is approved and confirmed and said Harrison claims be and they hereby are disallowed and expunged, except insofar as certain of said claims which involve so-called
1013 "qualified releases" include items of damages for rent, taxes, or otherwise, which had accrued and were provable at the time of the execution of such qualified releases.

ALFRED C. COXE,
U. S. D. J.

Petition for Appeal and District Court Order Allowing Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1014

[SAME TITLE.]

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Your petitioners, the ninety-four claimants herein, known as the Harrison claimants, conceiving themselves aggrieved by an order made by Honorable Alfred C. Coxe and entered herein on or about September 16, 1935, in so far as

Petition for Appeal and District Court Order Allowing Appeal.

1015

said order approved and confirmed the report of Honorable Irwin Kurtz, Special Master, dated August 15, 1935, do hereby petition for an appeal from the said order to the United States Circuit Court of Appeals, for the Second Circuit, and pray that their appeal may be allowed and that a citation may be granted, directed to Irving Trust Company, Trustee of the Debtor herein, and also to United Cigar Stores Company of America, Jacob Ruppert Realty Corporation, Landlords' Protective Committee, Preferred Stockholders' Protective Committee, Debentureholders' Protective Committee, and United Stores Corporation, commanding them to appear before the United States Circuit Court of Appeals for the Second Circuit and to do and receive that which may pertain to justice in the premises, and that a transcript of the record and evidence of said proceeding, duly authenticated, may be transmitted to said United States Circuit Court of Appeals for the Second Circuit.

1016

Joseph E. Otis Estate Land Trust,
H. A. Wolf Company,
Omaha Bus & Terminal Company,
Thomas Lafferty Estate,
William C. Zaring, as Trustee,
Mandel Lowenstine,
Clara Schaefer,
Smulekoff Investment Company,
Eli A. Nierman,
Emanuel A. & Samuel Novack,
Louis J. Naumann, Receiver,
Martin Maremont, Samuel S. & William B. Hork,
J. B. Moos,
Marks Corporation,

1017

1018

Whittell Realty Company,
El-Hy-Wa,
Gates Hotel Company,
Ankeny Company,
Charles F. Grey Estate,
Phoebe A. Hearst Estate,
Bertha Greenblatt,
Harry Hall, Trustee,
Western Real Estate Trustees,
Henry E. Rivers, Equity Receiver for Harrison Securities Company,
George S. Nalle & F. S. Smoot,

1019

Douglas Realty Company,
Security Title Building, Inc.,
Bourland Investment Company,
St. Louis Union Trust Company—Copelin Estate,
St. Louis Union Trust Company,
6900 South Halsted Bldg. Corp.,
Mary T. Johnson, Suzanne F. High, et al.,
Jennie M. Moberly & Gertrude Peacock, et al.,
California Pacific Title and Trust Company,
Charles W. & Virginia Bacon,
C. B. Anderson, Special Deputy Supt.,

1020

David Kornblith,
Otto Cedarblad,
Charles Carroll,
Carl A. Lothgren,
Jake Krasne Estate,
Thomas V. & Anna Vilim,
Edward Cox,
Nicholas D. Gianoulis,
Henry T. Buesche,
S. C. Hastings Trust Estate,
Abraham Lidsky & Isaac Keinigsberg,
Walter I. Lewis & Cap Bagdasarian,

Petition for Appeal and District Court Order Allowing Appeal.

1021

Lehmann Building Company,
State-Grand Building Corporation,
Israel Lanski Estate,
Flora M. Crosby, et al.,
David Arado,
Frances C. Copeland,
Bryson Estate Company,
C. K. Eddy & Sons,
Frances Realty Company,
Hill Hotel Company,
George W. Woodrich, Receiver,
Washington Fireproof Building Company, 1022
Frank G. Warden,
Samuel & Jacob Spitzer,
William H. Smith,
Herman W. Stroker, George D. Stroker, Amalia S. Ost, Bertha S. Williams and Anna S. Smith,
David & Catherine Ries,
The Register and Tribune Company,
Vinton-Pierce Company,
C. E. R. Building, Ltd.,
Harry G. Zimmerman, Trustee,
Jacob Lasker by Ira Lasker,
Charles Alfred Meyer, E. Olga Meyer, et al., 1023
by Alfred Cellier, Agent,
Wells Fargo Bank & Union Trust Company, as Executor of the Estate of George T. Marye, Jr., deceased,
Wells Fargo Bank & Union Trust Co., as Executor of the estate of George T. Marye, Jr., deceased,
Burton Building Company,
General Realty Company,
South Texas Operating Company,
Empire Building Investment Company,

Petition for Appeal and District Court Order Allowing Appeal.

1024

L. H. Guldman,
I. Eisner Company,
Wm. W. Linn Estate,
Mayfair Corporation,
Harris Trust & Savings Bank as Trustee, for Frances S. Dewes,
Abe Schwartz and Myrtle Schwartz,
William E. Munk and Warren H. Munk,
Simon Lorch,
J. E. Nunn,
Herbert Livingston and Sigmund Livingston,
Thomas Hassel Brown and Davenport Brown,

1025

Clarence H. Morgan, Myrtle M. Morgan, Mabel M. Edwards, George Edwards, John A. Sullivan,
Isador A. Rubel and Flora L. Rubel,
Detroit Trust Company, agent for Thomas Geis, et al.,
Louise S. Whitcomb and Florence Welsh,
William C. Harbach, receiver for Fleming Brothers, Incorporated,
Roy E. Bensley, Fred O. Excell and Stuart W. Excell, as trustees under the last will and testament of Robert Excell, deceased,

1026

By GILBERT, DIAMOND & BRANDEIS,
Attorneys for Petitioners-Appellants,
Office & P. O. Address,
745 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

The foregoing appeal is hereby allowed this 15th day of October, 1935.

HENRY W. GODDARD,
United States District Judge.

CW

(Verification.)

Notice of Appeal and of Motion for Leave to Appeal. 1027

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

[SAME TITLE.]

PLEASE TAKE NOTICE that the ninety-four so-called Harrison Claimants hereby appeal to the United States Circuit Court of Appeals for the 1028
Second Circuit from the order made and entered by the United States District Court for the Southern District of New York on or about September 16, 1935, confirming the report of Honorable Irwin Kurtz, the Special Master herein, dated August 15, 1935.

PLEASE TAKE NOTICE FURTHER that said Claimants have filed their petition of appeal with assignments of errors in the District Court and have filed copies thereof with this Court pursuant to Rule XXXVI of the Rules of this Court, 1029
and that copies of said petition and assignment of errors are annexed hereto and served on you herewith.

PLEASE TAKE NOTICE FURTHER that upon the annexed petition of said Harrison Claimants, verified October 14, 1935, the undersigned, as attorneys for said Harrison Claimants, will move this Court at the United States Court House, City, County and State of New York, for leave to appeal from said order of the District Court on the 21st day

1030

of October, 1935, at the opening of Court on that day, or as soon thereafter as counsel may be heard.

Dated, October 14, 1935.

Yours, etc.,

GILBERT, DIAMOND & BRANDEIS,
Attorneys for so-called
Harrison Claimants,
Office & P. O. Address,
745 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

1031

To:

CRAVATH, DEGERSDORFF, SWAINE & WOOD, ESQS.,
Attorneys for Irving Trust Company,
15 Broad Street, New York, N. Y.

ROSENBERG, GOLDMARK & COLIN, ESQS.,
Attorneys for Debtor,
165 Broadway, New York, N. Y.

M. CARL LEVINE, ESQ.,
Attorney for Jacob Ruppert Realty
Corporation,
535 Fifth Avenue, New York, N. Y.

1032

MITCHELL, TAYLOR, CAPRON & MARSH, ESQS.,
20 Exchange Place, New York, N. Y.

and

RALPH MONTGOMERY ARKUSH, ESQ.,
15 Broad Street, New York, N. Y.,
Attorney for Landlords' Protective
Committee.

SHEARMAN & STERLING, ESQS.,
55 Wall Street, New York, N. Y.

and 1033

BERLE & BERLE, ESQS.,
70 Pine Street, New York, N. Y.,
Attorneys for Preferred Stockholders'
Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER
& REED, ESQS.,
Attorneys for Debentureholders Protective
Committee,
15 Broad Street, New York, N. Y.

SULLIVAN & CROMWELL, ESQS.,
Attorneys for United Stores Corporation, 1034
48 Wall Street, New York, N. Y.

Assignments of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Now come the ninety-four claimants known herein as the Harrison group of claimants whose 1035
names are listed on a schedule appended to these assignments of errors, and file the following assignments of errors and say that the order of the United States District Court for the Southern District of New York, entered herein on or about the 16th day of September, 1935, in so far as said order approved and confirmed that report of Honorable Irwin Kurtz, Special Master, dated August 15, 1935, is erroneous for the following reasons:

1. The Court erred in confirming and approv-

1036 ing the report of the Special Master, dated August 15, 1935, which recommended that all of the ninety-four claims herein be expunged.

2. The Court erred in disallowing and expunging the claims of the ninety-four claimants, known as the Harrison claimants, except in so far as certain of the said claims include items of damage for rent, taxes and otherwise which had accrued and were provable at the time of the execution of the releases in those cases.

3. The Court erred in refusing to hold as
1037 a matter of law that Section 77B of the Bankruptcy Act created any rights in landlords.

4. The Court erred in refusing to hold as a matter of law that Section 77B of the Bankruptcy Act gives a provable claim for damages to every landlord whose lease was rejected by the trustee in bankruptcy, regardless of whether or not a provable claim existed on the date of the filing of the petition by the Debtor.

5. The Court erred in refusing to hold that the trustee in bankruptcy acted *ultra vires* of its duties as trustee in obtaining the releases of
1038 the claimants.

6. The Court erred in refusing to hold that the trustee in bankruptcy exercised unlawful duress in obtaining the releases from the claimants.

7. The Court erred in refusing to hold that the passage of Section 77B of the Bankruptcy Act created such rights in the claimants herein that an adjustment of property rights between the claimants, who had executed releases, and the Debtor, was necessary after passage of the said statute.

Assignments of Error.

8. The Court erred in refusing to hold that the trustee in bankruptcy procured the releases of the landlords' claimants without any consideration from the bankrupt other than that which properly belonged to the bankrupt estate. 1039

9. The Court is in error in failing to hold that the reservations contained in the twelve so-called qualified releases reserved to the said twelve claimants the right to file claims for damages in the proceedings.

10. The Court is in error in refusing to consider the records of all ninety-four cases as one record. 1040

11. The Court is in error in approving the ruling of the Special Master in excluding the question asked the witness James E. Otis on his direct examination by counsel for the claimant James E. Otis Estate Land Trust, whether he relied upon the statement of Mr. Wolff of Irving Trust Company that claimant had no claim for future rents and that claimant was not releasing anything of value.

12. The Court erred in approving the ruling of the Special Master in overruling the objection of counsel for the claimant, James E. Otis Estate Land Trust, to a question asked by counsel for the trustee of United Cigar Stores Company as to the arrangements with Mr. Harrison concerning the basis on which Mr. Harrison was to be compensated for this claim. 1041

13. The Court erred in approving the ruling of the Special Master in overruling the objection of counsel for the claimant, James E. Otis Estate Land Trust, to a question asked by counsel for the said claimant as to what amount Mr. Adams would pay Mr. Harrison of the thirty per cent. retainer between Mr. Harrison and the claimant.

Assignments of Error.

1042 14. The Court erred in approving the ruling of the Special Master in overruling the objection of counsel for the claimants, Dan M. Boone, et al., to the question by counsel for the intervenor, Jacob Ruppert Realty Corporation, which asked for the production of the agreement between the claimants Boone, et al, and Solomon E. Harrison.

15. The Court erred in approving the ruling of the Special Master in permitting counsel for the intervenor Jacob Ruppert Realty Corporation to introduce into evidence over the objection of counsel to the claimant Mandel Lowenstein, Ob-
1043 jecting Creditor's Exhibit 1, which was a memorandum of suggested lease prepared by claimant, but not signed or used by the parties.

16. The Court is in error in approving the ruling of the Special Master in striking out the testimony of the witness Walter Fyfe which was given during the trial of the Novack claim. The testimony of the said witness was substantially as follows:

The witness was employed by Irving Trust Company, Receivership Department, prior to the bankruptcy of the United Cigar Stores Company
1044 of America. From September 10, 1932 to the end of the year 1932 he was in Chicago, representing Irving Trust Company in the United Cigar Stores Company of America bankruptcy. The witness took care of matters pertaining to leases and merchandise that emanated out of the Chicago area. Before leaving New York he had a conversation with Hugh Stringham of Irving Trust Company, who had charge of the case, and also with Irving Trust Company representatives in New York, as well as with numerous members of the organization of United Cigar Stores Company of America in New York. He knew that

it was the purpose of the trustee in bankruptcy 1045
to treat all landlords alike, and that such statements were made to landlords in negotiations that were conducted by representatives of the trustee. He did not recall discussing the Novack claim with a Mr. Wolff. He did not recall being asked what the effect of the release clause would be if the United Cigar Stores Company of America were not liquidated in bankruptcy. It was the policy of the trustee to abandon all locations where landlords refused to accept leases that contained the release clause. He discussed that policy with Mr. Stringham. Releases were constantly coming 1046
up for discussion. The trustee was trying to maintain as many locations as possible and satisfy the landlords as to the releases. The objections were raised primarily on the absolute releases.

Where the landlords refused to sign the releases they were allowed to submit alterations which were sent to New York for approval. If the alterations were acceptable they were accepted. In the cases of tax claims, there was eventually formulated a rider which was allowed to be inserted in those claims where taxes were a part of the lease, where it was a net lease.

Cross Examination: The witness heard the 1047
testimony of Hugh Stringham with regard to his conversation with Mr. Darrell of Sullivan & Cromwell, as the attorneys who represented the United Cigar Stores Company of America. He had no conversation with Mr. Darrell or with anyone of the Debtors with regard to the assignment back by the Debtor to the landlords of the leases. The matter of the lease documents was not brought up until after he had left New York for Chicago. He had nothing to do with the decision and arrangement for the bankrupt company joining in the assignment back to the landlords.

1048 The question arising from the effect of these release clauses was sometimes, but not always, as to the reservation of a landlord's provable claim for back taxes. The clause was objected to in the blue form and also in the brown form. Some of the landlords asked that it be made a condition of the execution of their assignments that the claim for back taxes be allowed. The witness submitted that request to New York. His function was not one of determination of policy but of carrying out instructions from New York. He referred any question as to releases or other
1049 provisions of the assignment agreement to New York.

17. The Court erred in approving the ruling of the Special Master in sustaining the objections of counsel for the trustee and of counsel for the intervenors to the offer by counsel for the claimants herein to make the testimony of the witness Walter Fyfe a part of the record of the trial of each of the ninety-four claims herein.

18. The Court erred in approving the ruling of the Special Master in permitting the witness Grean to testify at the trial of the claim of claim-
1050 ant Abe Schwartz and Myrtle Schwartz as to the general course of procedure of the Debtor and the advice given to the Debtor in conjunction with all of the claims, over the objection of counsel for the claimants, and also in permitting the testimony to be made a part of the record of each of the ninety-four claims.

19. The Court erred in approving the ruling of the Special Master in permitting the trustee to cross-examine the witness Walter Fyfe after the testimony on direct examination of said witness had been stricken out.

Assignments of Error.

20. The Court erred in approving the ruling of the Special Master in permitting the witness Walter Fyfe to answer over the objection of counsel for the claimants the question whether he approached Mr. Stringham with a view to getting a list of landlords. 1051

21. The Court erred in approving the ruling of the Special Master in refusing to receive in evidence "Claimants' Exhibit B for Identification". Said exhibit was a certified financial statement of the United Cigar Stores Company of America, as of December 31, 1931.

22. The Court is in error in approving the ruling of the Special Master in refusing to permit counsel for the claimants to try one so-called fully released claim and one so-called qualified release claim in each of the two groups of claims herein and allow the decisions of the ninety-two other claims to follow those two decisions. 1052

WHEREFORE, your petitioner prays that the said order of the United States District Court for the Southern District of New York, entered herein on or about September 16, 1935, may be reversed, except in so far as it allows items of damages for rent, taxes or otherwise, which had accrued and were provable at the time of the execution of the so-called qualified releases. 1053

Dated, October 14, 1935.

GILBERT, DIAMOND &
BRANDEIS,
Attorneys for the so-called
Harrison Claimants,
Office & P. O. Address,
745 Fifth Avenue,
Borough of Manhattan,
New York, N. Y.

(Schedule of 94 Claimants-Appellants.)

Citation.

1054 *By the Honorable Henry W. Goddard, one of the United States District Judges for the Southern District of New York, in the Second Circuit, to Irving Trust Company: United Cigar Stores Company of America; Jacob Ruppert Realty Corporation: Landlords' Protective Committee; Preferred Stockholders' Protective Committee; Debentureholders Protective Committee; United Stores Corporation,* GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden
1055 at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on the 14th day of November, 1935, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein the so-called Harrison group of claimants are appellants and you are appellees and you are required to show cause, if any there be, why the order in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Man-
1056 hattan, in the City of New York, in the District and Circuit above named, this 15th day of October in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

HENRY W. GODDARD,
United States Judge for the Southern District of New York in the Second Circuit.

Order of Circuit Court of Appeals Allowing Appeal.

1057

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court rooms in the Post Office Building in the City of New York, on the 28th day of October, one thousand nine hundred and thirty-five.

Present—HON. LEARNED HAND,
" THOMAS W. SWAN,
" AUGUSTUS N. HAND,
Circuit Judges. 1058

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor,

HARRISON CLAIMANTS,
Appellants.

A motion having been made herein by counsel for the appellants for leave to appeal from a certain order of the District Court dated October 21, 1935, 1059

Upon consideration thereof it is

Ordered that said motion be and hereby is granted.

WM. PARKIN,
Clerk.

Stipulation and Order Extending Time to File Record.

1060

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

1061 IT IS HEREBY STIPULATED by and among the undersigned attorneys that the time for the Harrison Claimants to file the transcript of record of their appeal be and the same hereby is extended to and including November 21, 1935, and that the Term of the Court be extended for that purpose.

Dated, New York, November 8, 1935.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Harrison Claimants.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company.

1062

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

Stipulation and Order Extending Time to File Record.

1063

SHEARMAN & STERLING
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

1064

SO ORDERED.

Dated, New York, November 12, 1935.

CHARLES WEISER,
Clerk.

Stipulation and Order Extending Time to File Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1065

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned attorneys that the time of the Harrison Claimants to file the printed record of the appeal of their claims with the Clerk of the Court, be and the same hereby is extended to and including the 2nd day of December, 1935, and that the Term of this Court be extended for

1066

that purpose and that an order to that effect may be entered without further notice.

Dated, New York, November 19, 1935.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Harrison Claimants.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty
1067 Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

SHEARMAN & STERLING
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

1068

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

SO ORDERED.

November 20, 1935.

WM. BONDY,
U. S. D. J.

Stipulation and Order Extending Time to File Record.

1069

UNITED STATES DISTRICT COURT.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned attorneys that the time of the Harrison Claimants to file the printed record of the appeal of their claims with the Clerk of the Court, be and the same hereby is extended to and including the 9th day of December, 1935, and that the Term of this Court be extended for that purpose and that an order to that effect may be entered without further notice.

1070

Dated, New York, November 29, 1935.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Harrison Claimants.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company.

1071

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

Stipulation and Order Extending Time to File Record.

1072

SHEARMAN & STERLING
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

1073

SO ORDERED.

November 30th, 1935.

WM. BONDY,
U. S. D. J.

Stipulation and Order Extending Time to File Record.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1074

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned attorneys that the time of the Harrison Claimants to file the printed record on appeal be and the same hereby is extended to and including January 2, 1936, and that the Term of this Court be extended for that purpose, and

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that an order to that effect may be entered without further notice.

Dated, New York, December 7, 1935.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Harrison Claimants.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

1076

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

SHEARMAN & STERLING
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

1077

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

SO ORDERED.

December 9th, 1935.

HENRY W. GODDARD,
U. S. D. J.

C. W.

Stipulation and Order Extending Time to File Record.

1078

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

1079 IT IS HEREBY STIPULATED AND AGREED by and among the undersigned attorneys that the time of the Harrison Claimants to file the printed record of the appeal of their claims with the Clerk of the Court, be and the same hereby is extended to and including the 9th day of January, 1936, and that the Term of this Court be extended for that purpose and that an order to that effect may be entered without further notice.

Dated, New York, January 6th, 1936.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Harrison Claimants.

1080 CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

Stipulation and Order Extending Time to File Record.

1081

SHEARMAN & STERLING
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

SO ORDERED.

12/31/35.

1082

FRANCIS G. CAFFEY,
U. S. D. J.
C. W.

1083

Stipulation as to Record.

1084 UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS STIPULATED AND AGREED by and among the attorneys for the respective parties hereto that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties, and that, although the record printed herewith is not the complete record and does not contain every exhibit
1085 offered on the trials of the 94 claims herein it is accepted as complete for the purposes of determining the issues involved in this appeal.

IT IS FURTHER STIPULATED that all papers and documents which were before the Special Master may be referred to in the briefs or on the argument, and if so referred to, the said documents or copies thereof shall be handed to the Court upon the argument of the appeal herein.

Dated, New York, January 6th, 1936.

GILBERT, DIAMOND & BRANDEIS,
Attorneys for Harrison Claimants.

1086

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

Stipulation as to Record.

SHEARMAN & STERLING 1087
and
BERLE & BERLE,
Attorneys for Preferred Stockholders Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

1088

1089

Clerk's Certificate.

1090 UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

United States of America,
Southern District of New York—ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of
1091 the said District Court in the above-entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District, this 9th day of January in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the said United States the one hundred and sixtieth.

CHARLES WEISER,
Clerk.

(Seal)

1092

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935 1093

Argued March 3, 1936. Decided April 6, 1936

No. 289

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

JOSEPH E. OTIS ESTATE LAND TRUST et al., Appellants,

IRVING TRUST COMPANY, as Trustee; UNITED CIGAR STORES COMPANY OF AMERICA, Landlords' Protective Committee, Preferred Stockholders' Protective Committee, Debenture Holders' Protective Committee, Jacob Rupert Realty Corporation, and United Stores Corporation, Appellees 1094

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York disallowing 1095 and expunging ninety-four claims, in so far as they were for future rent, filed by lessors against the estate of the debtor in reorganization proceedings under section 77B of the Bankruptcy Act (11 U. S. C. A. §207).

Ernst Gale, Bernays & Falk, of New York City (Murray C. Bernays and Henry Gale, both of New York City, of counsel), for estate of Grey and estate of Clarke.

Gould & Wilkie, of New York City (R. L. von Bernuth and D. L. Bugg, both of New York City,

of counsel), for General Society of Mechanics
1096 and Tradesmen.

Olney & Comstock, of New York City (Irving Smith, Jr., of New York City, of counsel), for Boswell estate.

Clark, Carr & Ellis, of New York City (Joseph F. Mann, of New York City, of counsel), for Arthur D. Hill.

John B. Doyle, of New York City, for Henry J. Sontag and others.

Curtis, Mallett-Prevost, Colt & Mosle, of New York City (Dudley B. Bonsal, of New York City, of counsel), for Beer Realty Co., and Lindner, Inc.

1097 Middlebrook & Sincerbeaux, of New York City (W. E. Shrewsbury, of New York City, of counsel), for estate of Charles Frederick Hoffman.

Lampke & Stein, of New York City (James A. Berry, Jr., of New York City, of counsel), for Adele Rosenthal.

David W. Kahn and Joseph H. Kohan, both of New York City, for Charles E. Nauss and others.

Gilbert, Diamond & Brandeis, of New York City, and Solomon E. Harrison and Benjamin I. Morris, both of Chicago, Ill. (Milton Diamond, Susan Brandeis, Emanuel Feldberg, and Benja-
1098 min Pollack, all of New York City, of counsel), for appellants.

Shearman & Sterling and Berle & Berle, all of New York City, for appellees herein, Preferred Stockholders' Protective Committee.

Milbank, Tweed, Hope & Webb, of New York City (Sanford H. E. Freund, H. Struve Hensel, Winthrop H. Kellogg, and Douglas B. Steimle, all of New York City, of counsel), for Phoenix Securities Corporation, intervener herein and owner of a substantial number of shares of preferred stock of the debtor.

Mitchell, Taylor, Capron & Marsh, of New York City, for Landlords' Protective Committee. 1099

Cravath, de Gersdorff, Swaine & Wood, of New York City (Wm. D. Whitney, Donald C. Swatland, and R. L. Gilpatric, all of New York City, of counsel), for reorganization trustee.

Davis, Polk, Wardwell, Gardiner & Reed (Edgar G. Crossman and Edward R. Wardwell, both of New York City, of counsel), for appellee, Debenture Holders' Protective Committee.

CHASE, Circuit Judge:

Before the present proceedings were begun by the filing by the debtor of its voluntary petition for reorganization under section 77B, Bankr. Act (11 U. S. C. A. § 207), on June 9, 1934, it had 1100 filed a voluntary petition in bankruptcy on August 29, 1932, been adjudicated a bankrupt on the same day in the District Court for the Southern District of New York, and ever since its estate had been administered in bankruptcy by the Irving Trust Company, first as its receiver, and later as its duly qualified trustee. The same trustee is also the trustee in these proceedings.

One of the reasons for the bankrupt's financial difficulties at the time it filed its petition in bankruptcy was the fact that it held numerous 1101 parcels of real estate under burdensome leases. There were about one thousand such leases which the trustee found it advisable either to abandon or to modify if more favorable terms could be obtained. Previous to bankruptcy the bankrupt had endeavored to adjust some of the leases and had organized corporations in various states for the purpose of taking them over where suitable arrangements with the lessors could be made. The trustee also made use of such corporations, all of whose stock it owned.

The bankrupt was the owner of a chain of
1102 retail stores scattered through a number of states, and the trustee found that its leases generally covered either premises used exclusively by the bankrupt, or a subsidiary, for a retail store or premises partly so used and partly sublet. To meet the various situations, the trustee prepared several forms of lease modification to offer to lessors, and they may be outlined briefly.

One was for use where the bankrupt had been using the premises exclusively for one of its stores and the trustee desired to continue to operate the store. Such an agreement contem-
1103 plated the assignment of the lease to a local corporation whose stock was all owned by the trustee and the lowering of the rent. The parties to such an assignment were the trustee, the bankrupt, the lessor, and the local corporation who became the tenant. Such an arrangement included the assignment of all the leasehold interest of the trustee and the bankrupt to the new tenant, the decrease of the rent by the lessor, the use of the modified lease as an agreement for use and occupation by the trustee, the payment of the consideration of $1.00 to the lessor, and the release by the lessor of all claims under the lease, either in
1104 its original form or as modified, against the Irving Trust Company individually or as receiver or as trustee and also against the bankrupt estate, and the bankrupt.

Another was for use where the bankrupt had been using the premises exclusively as a store and the trustee did not desire to continue to operate the store. This provided for the assignment to the lessor by the trustee and the bankrupt of all their interest in the lease and the fixtures and furnishings in the store and for a release to them and to the bankrupt estate by the lessor the same in effect as above noted.

Another was for use where the bankrupt had been using part of the leased premises for a store and subletting the remainder and the trustee did not wish to run the store. That provided for the assignment by the trustee and the bankrupt to the lessor of all their interest in the lease, the subleases, the rents accrued and to accrue under the subleases, and to the fixtures and furnishings in the store the bankrupt had operated. The lessor assumed all the obligations of the trustee and the bankrupt under the subleases, and gave to them and the bankrupt estate a release in like effect as that already mentioned. 1105

Two others were for use together in cases where the bankrupt both occupied part and sublet part and the trustee wished to continue the store. Then one form contained a use and occupancy agreement. The other provided for the assignment by the trustee and the bankrupt of all their interest in the main lease except as it covered the store the bankrupt had used and in the subleases and in all of the rents accrued and to accrue under the subleases; the lessor assumed all the obligations of the trustee and the bankrupt under the lease and subleases, agreed to hold them harmless from any liability thereunder, and gave them and the bankrupt estate a release similar to those already mentioned except as to that portion of the premises used as a store by the trustee and covered by the above-noted use and occupancy agreement. 1106 1107

Another was for use where the bankrupt had leased premises on which it had operated no store but had sublet the property. That provided for the assignment by the trustee and the bankrupt to the lessor of all their interest in the lease and subleases and to rents accrued and to accrue under the subleases, for a release to them and the bankrupt estate from the lessor similar to those already mentioned, and for the assumption by the lessor

of all their obligations under the lease and the
1108 subleases.

Agents of the trustee made agreements with all the landlords whose claims are here involved which resulted in the execution of one or another of the types of modification of the original leases which have been briefly described. In a few instances, which will be discussed later, a typewritten rider was attached which limited the release given by the landlords. And in two instances the consideration for the execution of the release was solely a cash payment to the landlord.

Of the claims disallowed and expunged, forty-two were based on leases which had, before sec-
1109 tion 77B was enacted, been so modified as to substitute a subsidiary of the bankrupt as tenant at a reduced rental; twenty-eight on leases so modified as to substitute such a subsidiary as tenant at reduced rental of part of the premises and the landlord took over the remainder; and twenty-four on leases where the landlord took over the entire premises.

For present purposes it will be helpful to put all the claims into two groups: The first, called "A," to include those based on leases which were either modified or assigned to the lessors who accepted
1110 the new relationship created and gave general unqualified releases of all claims under the original leases. The second, to be known as class B, in which the general situation is the same with the exception that the scope of the releases was modified. It is to be noted that in respect to every lease upon which a claim has been filed the lessor had entered into a modification agreement while the original bankruptcy proceedings were pending which materially altered the legal relationship of the parties and in addition had released the trustee, the bankrupt, and the bankrupt's estate either from all obligation under the original leases or

from all but what was reserved in some instances by special restricting language. There were twelve 1111
thus restricted. One excepted only claims accruing prior to bankruptcy; one expressly provided that the limitation should not apply to "any claim for rent under the lease or for damages in respect thereof"; and a third only related to any claim theretofore filed in the pending bankruptcy proceeding. These three claims obviously stand the same as those in class A for all purposes germane to this appeal, and will be so treated.

The remaining nine claims had riders attached to the article containing the general release providing that:

"Nothing in this article shall be deemed a 1112
waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable one which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the Trustee from contesting such proof and allowance."

The lessors who executed unqualified general releases have sought to avoid their effect by an attempt, so far unsuccessful, to show that they 1113
were obtained by some sort of subtle duress whereby the trustee coerced the landlords to give up rights under the leases for the benefit of the bankrupt. Those who signed the modified releases make no such claim, but seek a construction of their releases which will now permit the filing of their claims. Though we are inclined to agree with the court below that no sufficient proof has been made of wrongdoing on the part of the trustee to enable the claimants to avoid the effect of the releases given, decision need not turn solely on the releases except in the two instances where the leases were terminated for a cash consideration

and releases given. None of the lessors question
1114 the validity of the modifications of the original leases whereby they accepted a surrender of the leased premises before section 77B was enacted, and all have retained whatever benefit they so received.

As to forty-two claims, the landlords accepted the premises each with a new tenant whom it was agreed the landlord would hold solely liable for performance after September 1, 1932, to which time the rent under the original lease had been fully paid. No rights against the lessee under the original leases were reserved. The effect as a matter of law was to relieve the lessee from any
1115 further liability under the old lease. T. A. D. Jones Co. v. Winchester Repeating Arms Co. (C. C. A.) 61 F. (2d) 774. See Grey v. Kaufman Dairy & Ice Cream Co., 162 N. Y. 388, 56 N. E. 903, 49 L. R. A. 580, 76 Am. St. Rep. 327.

In forty-seven instances the original leases themselves were assigned to the landlords; two of them being assignments by subsidiaries of the lessee to whom assignments had been made before bankruptcy. And three leases were canceled by agreement with the landlords without assignment. In each instance the landlords accepted the surrender
1116 of the premises and the right of the lessee to future possession was terminated. That also ended the liability of the lessee for future rent under the leases. In re Sherwoods, Inc., (C. C. A.) 210 F. 754, Ann. Cas. 1916A, 940; American Bonding Co. v. Pueblo Investment Co. (C. C. A.) 150 F. 17, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357. In the two instances where all that was done was to pay cash for a general release of all liability under the lease, the finding that the releases were valid is amply supported by the evidence.

The general releases which were unqualified by riders simply overlapped in blanket form what in legal effect had already been done by the les-

sors and the debtor in respect to the future rent claims under the leases; that is, no such claims 1117
survived the modification agreements to be caught and barred by the general releases. The same is equally true of the agreements containing releases qualified by riders. The riders neither purported to nor did limit in any way the effect of the agreements for lease modification. They simply reserved the right to prove such claims as the bankruptcy court might decide were provable without regard to the general release. But it was expressly agreed that the landlords should not be relieved from "the necessity of proving and obtaining the allowance of any such claim." Clearly the landlords were left only with the 1118
right to prove claims which were not only of the kind which might be held provable in bankruptcy, but were capable of being proved as legal obligations of the bankrupt over any substantive defense which might be made to their allowance.

Under section 77B (b) (10), 11 U. S. C. A. §207(b)(10), landlord's claims for injury from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant in the lease are to be treated like debts provable under section 63a, 11 U. S. C. A. §103(a); the amount allowable not to exceed the rent, without 1119
acceleration, reserved for the three years next succeeding the date of surrender to the landlord, unless he has previously re-entered when that date is taken as the base instead, plus unpaid rent then accrued. While it is plain that claims for future rent are provable in 77B reorganization proceedings where they would not have been under the act as it stood previously, it is equally plain that whatever change in this respect was made had to do only with the remedy. It is necessary to have a claim against a debtor which the substantive law of landlord and tenant recognizes as

an enforceable claim in order to have a provable
1120 claim under section 77B. That section does not extend the liability of a lessee beyond what it otherwise would be under applicable law. If under such law a landlord would have a claim against a lessee for damages or indemnity under a covenant contained in a lease which would have been recoverable in a civil action had there been no 77B petition approved, such claim may be proved in the 77B proceedings and allowed to the limited extent above indicated. Likewise where an executory contract or an unexpired lease has been rejected pursuant to the direction of the judge in such a proceeding or by a trustee
1121 or receiver in bankruptcy or a receiver in equity in a proceeding pending before the 77B petition was filed. But there is no new definition of a claim; only of a creditor. A landlord having a claim under the applicable state law of the nature set forth in section 77B(b)(10) is a creditor under section 77B with a creditor's rights thereunder, including, of course, the right to prove and have his claim allowed.

It follows that, as none of the claims arose from the rejection of leases and all the original leases upon which they are based were terminated by
1122 agreement of the parties before these proceedings were instituted and, indeed, before section 77B was passed, and the leased real estate surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee, this debtor, the lessors, have no valid claims for future rent.

The issue here is not one of the provability of actual claims for future rent, but rather one of recognition that the claimants have no claims at all against the debtor or its estate. Before 77B, a bankrupt might be left liable to a landlord because a valid future rent claim was not provable

against his estate and so not dischargeable. Now a debtor will be relieved from future liability on such claims since they are provable under 77B, but nothing has been done to bring into being substantive rights, before nonexistent, to form the basis of provable claims. 1123

Order affirmed.

Augustus N. Hand, Circuit Judge, dissents in part and concurs in part in separate opinion.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued March 3, 1936. Decided April 6, 1936

No. 289 1124

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

JOSEPHINE E. OTIS ESTATE LAND TRUST et al., Appellants,

IRVING TRUST COMPANY, as Trustee; UNITED CIGAR STORES COMPANY OF AMERICA, Landlords' Protective Committee, Preferred Stockholders' Protective Committee, Debenture Holders' Protective Committee, Jacob Rupert Realty Corporation, and United Stores Corporation, Appellees 1125

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

AUGUSTUS N. HAND, Circuit Judge (dissenting in part):

I concur in the opinion of Judge Chase except as to the claims covered by the qualified releases.

In all the other cases the unqualified releases
1126 barred the claims here sought to be proved by the landlords. Three claims in which there were qualified releases but which are not among the nine first mentioned, namely, Nos. 5241, 5281, and 5287, did not reserve rights to future rent. The nine claims as to which I dissent are all asserted in cases in which the original leases were modified by agreement of the parties prior to the enactment of section 77B of the Bankruptcy Act (11 U. S. C. A. § 207) and in which the landlords had accepted surrender of the demised premises pursuant to the agreements. In the agreements there were not only modifications or assign-
1127 ments to the landlord by the trustee and the bankrupt of all their interest in the leases but also general releases by the landlords of all claims against the trustee, the bankrupt, and the bankrupt estate. There were, however, riders attached to each instrument in substantially the following form qualifying the releases:

"Nothing in this Article shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the bankruptcy court may adjudge the Landlord is entitled, but this shall not be deemed
1128 to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the trustee from contesting such proof or allowance."

Now this rider, which is part of the same instrument that contained the general release and so modified the relation of landlord and tenant as to bring about a surrender, cannot be regarded as an instrument which did not "limit in any way the effect of the agreements for lease

modifications." The prevailing opinion is based upon the theory that the rider did not involve 1129
any alteration of the rights of the parties to future rent claims as they would have stood if it had never been added to the agreement. Such an interpretation of the acts and written memorials embodying their understandings contradicts the purpose of the rider. It is said in the opinion that the leased real estate was "surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee. * * *" But that, I think, is not at all what was done. Not only did the statement in the rider that there was no "waiver by the Landlord of the right to prove against the bankrupt 1130
estate any provable claim" limit the general release, but the rider cannot have the meaning intended unless it be taken to reserve against the bankrupt's estate any claims which existed but for the surrender and general release. Indeed, this is exactly what the master found to have been the intent of the parties who made the agreements; and the trustee and the debenture bondholders have conceded the purpose of the qualified releases was to reserve future rent claims for judicial determination. See Trustee's Brief, pp. 11, 29, 37; Debenture Bondholders' Brief, pp. 1131
12, 13.

The master held that the future rent claims contemplated as provable were those that might have been proved had the decision of the Supreme Court in Manhattan Properties, Inc., v. Irving Trust Co., 291 U. S. 320, 54 S. Ct. 385, 78 L. Ed. 824, gone the other way and allowed proof of claims for future rent. But remedial legislation as to such claims was already before Congress when the agreements were made, and the riders

nowhere limited claims which might be proved
1132 to those that the law then allowed. The riders specified "any provable claims to which the bankruptcy court may adjudge the Landlord is entitled." This, I think, embraced any claims which might then be provable or which might become provable through subsequent legislation. The enactment of section 77B as an amendment of the existing Bankruptcy Act allowed proof of future rent claims to a limited amount, and these the nine claimants should be allowed to prove. I can see no distinction between a provability arising from legislative sanction and provability arising from judicial decision.

1133 I would add that the effect of the assignments and surrenders was not litigated in the court below, which considered only the effect of the releases and interpreted them as reserving merely such claims for future rent as might be proved in bankruptcy prior to the enactment of section 77B

The order so far as it affected the nine claims I have mentioned should be reversed, and proof of these claims should be allowed in the 77B proceeding.

1134

Order For Mandate. 1135

UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the United States Court House in the City of New York, on the 13th day of April, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges. 1136

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor

JOSEPH E. OTIS ESTATE LAND TRUST et al.,
Appellants,

Appeal from the District Court of the United States for the Southern District of New York 1137

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to
1138 the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In Re United Cigar Stores Company of America (Otis). Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed April 13, 1936. William Parkin, Clerk.

[Stamp:] United States Circuit Court of Appeals, Second Circuit. Filed Apr. 21, 1936. William Parkin, Clerk.

1139

14501

Petition for Rehearing.

[Cover]

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

1140 JOSEPH E. OTIS ESTATE LAND TRUST et al., Appellants

IRVING TRUST COMPANY, as Trustee, et al., Appellees

PETITION OF CERTAIN APPELLANTS FOR REHEARING

Gilbert, Diamond & Brandeis, Attorneys for Appellants, No. 745 Fifth Avenue, New York City.

Milton Diamond, Emanuel Feldberg, Murray C. Bernays, Henry Gale, of Counsel.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR
1144 THE SECOND CIRCUIT

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor

JOSEPH E. OTIS ESTATE LAND TRUST et al.,
Appellants

IRVING TRUST COMPANY, as Trustee, et al, Appellees

Petition for Rehearing With Respect to Certain Claims Herein

1145 To the Honorable Judges of the Circuit Court of Appeals for the Second Circuit:

This petition for rehearing is made with respect to the nine claims involving qualified agreements of assignment and release[1] on the following separate and distinct grounds:

(1) The application of the majority opinion to the facts of six of such claims[2] requires that such claims be allowed instead of rejected, and

(2) As to all of such nine claims, Section 77B specifically contemplates surrender and acceptance and makes the claim of a landlord for in-
1146 jury resulting from rejection a provable claim in bankruptcy irrespective of surrender.

The two arguments are on entirely different bases. The first accepts the majority opinion and applies it to the special facts of six of the claims

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[1] Nos. 5235 Excell Trustees, 5277 Wm. E. and Warren H. Munk, 5286 Simon Lorch, 5302 Louise S. Whitcomb and Florence Welch, 5304 Abe and Myrtle Schwartz, 5312 Isidor A. and Flora L. Rubel, 5341 Thos. H. Brown et al., 5406 Herbert and Sigmund Livingston, as Trustees, and 5421 J. E. Nunn.

[2] Nos. 5235, 5277, 5302, 5312, 5341 and 5406.

which differentiate those six from the others. The second attempts to show that the majority opinion is in error. 1147

Petitioners particularly urge upon the attention of the Court the six claims first mentioned above. The particular facts of these cases has never been brought to the attention of this Court because they appeared not to be important in relation to the theory on which the case was originally submitted, but when the decision of a majority of the Court and the reasoning set forth in its opinion is applied to the facts, it is apparent that each of these six claims should be allowed instead of rejected. The facts have not heretofore been argued in detail because the cases 1148 were argued before this Court on an entirely different theory from that argued before the District Court and the Special Master, and the distinctions between these cases and the other 88 claims originally presented seemed immaterial. As a result, there has never been any consideration of such claims in the light of the principles of law announced by the majority opinion herein.

The Majority Opinion, Applied to the Specific Facts of Six Claims, Requires That They Be Allowed Instead of Rejected. 1149

I

The qualification in terms related to the entire assignment agreement, and not merely to the release clause in claims numbers 5312 (Rubel) and 5406 (Livingston). Under the holding of the majority opinion these two claims should accordingly be allowed.

The essence of the majority opinion as to claims involving the qualified agreements of assignment and release is that the typical qualifying riders

"neither purported to nor did limit in any way
1150 the effect of the agreements for lease modification" (op. p. 9), but related only to the release clauses in the assignment agreements. The opinion holds the assignment agreements have the effect of surrenders and acceptances which destroy the landlord's otherwise provable claims; that the release clauses added nothing to the legal effect of the surrender and acceptance; and that the qualifications related only to the release clauses and not to the entire agreements.

This reasoning may apply to the effect of the so-called typical qualification rider which is quoted in full in the opinion. But it does not
1151 apply to the form of qualification in the claims of Rubel (No. 5312, fol. 684) and Livingston (No. 5406, fols. 565-6). In these two claims the qualifications, unlike the typical form, in express terms preserve claims not merely from the operation of the release clauses, but from the operation of the assignment agreements as a whole. The difference in the language and effect of these qualifications may be seen by placing them in parallel columns as follows:

	The Typical Qualification	The Rubel Qualification
1152	"Nothing in this article shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to ren-	"It is understood and agreed, however, that nothing in Article 5 of this agreement, or in any other portion of this agreement, shall be deemed a waiver by the landlord to prove against the Bankrupt Estate any provable claims to which the

The Typical Qualification	The Livingston Qualification	
der any claim a provable one which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the Trustee from contesting such proof and allowance."	Bankruptcy Court may adjudge the landlord is entitled."	1153
"Nothing in this article shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable one which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the Trustee from contesting such proof and allowance."	"It is, however, expressly understood and agreed that the said Landlord does not waive any r i g h t to p r o v e against the Bankrupt E s t a t e any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. All such provable claims shall not be affected by this agreement."	1154 1155

The basic holding of the majority opinion that
1156 "the riders neither purported to nor did limit in any way the effect of the agreements for lease modification" obviously does not apply to either of the above cases. In each of them the qualification does purport to and does limit the effect of the agreement. Even though the agreement operated as a surrender of the lease, the landlord retained all rights specified in such agreement. Morgan v. Smith, 70 N. Y. 537, 546; McKensie v. Farrell, 4 Bosw. 192, 204, 206; McAdam Landlord and Tenant, 5th Edition, Vol. 2, Section 320.

Under the reasoning of the majority opinion, the Rubel (No. 5312) and Livingston (No. 5406)
1157 claims should accordingly be allowed.

II

The assignment agreement did not operate as a surrender or acceptance in two claims—No. 5341 (Brown) and No. 5286 (Lorch). Under the holding of the majority opinion these claims should accordingly be allowed.

In the claim of Thomas H. Brown et al. (No. 5341—fols. 634 et seq.), the assignment of the lease by the Trustee and the Bankrupt was made, not to the landlord, but to a third party, Percy Loring (fols. 638, 639).

1158 A surrender to be effectual must be made to the lessor or the reversioner.

> Beall v. White, 94 U. S. 382, 389;
> Coe v. Hobby, 72 N. Y. 141, 145;
> Van Rensselaer's Heirs v. Penniman, 6 Wend. 569, 580;
> Schieffelin v. Carpenter, 15 Wen. 400, 405;
> McAdam, Landlord & Tenant, 5th Ed. Vol. II, Sec. 318.

The rights of the landlord in the Brown case were accordingly not cut off by surrender, be-

cause there was none. The reasoning of the majority opinion accordingly does not apply to this case. 1159

Paragraph Fourth of the assignment agreement (fol. 642), in which it is provided that the landlord assumes and agrees to perform all existing and future obligations to be performed by the Bankrupt or the Trustee, does not operate as a substitute for the surrender. It is merely an agreement for indemnification. It runs by its terms only to the Bankrupt and to the Trustee. Since the claim is preserved only against the Bankrupt Estate, constituting and treated throughout the agreement as an entity separate from the Bankrupt and the Trustee, we believe that the 1160 landlord is not liable even for any indemnification.

The claim of Simon Lorch, No. 5286, is governed by the same reasoning. In that claim the qualifying rider expressly provided that upon the assignment there should be no merger of the term with the reversion (fol. 459). The intent of the parties governs and it follows that there was no union of the two estates and therefore no surrender. (Reeves on Real Property, §§ 649, 650.) This circumstance was referred to in oral argument by counsel for the appellees who all but conceded that by virtue of this rider provable 1161 claims were preserved in the Lorch case.

III

The leases were formally rejected by the Trustee in five claims[3] before assignment agreements were entered into. Under the majority opinion these claims should be allowed.

The majority opinion is based in part on the conclusion that:

"It follows that *as none of the claims arose from the rejection of leases* and all the original

[3] Nos. 5235, 5277, 5302, 5341 and 5406.

leases upon which they are based were terminated
1162 by agreement of the parties before these proceedings were instituted and, indeed, before Sec. 77B was passed, and the leased real estate surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee, this debtor, the lessors have no valid claims for future rent."

In fact, the lease was formally rejected by the Trustee prior to the making of any agreement in cases

5235 Excell Trustees
5277 Wm. E. and Warren H. Munk
5302 Louise S. Whitcomb and Florence
1163 Welch
5341 Thos. H. Brown et al.
5406 Herbert and Sigmund Livingston, as Trustees

(Schedule A, Annexed to Stipulation, fols. 961, 962, p. 321.)

By virtue of such rejections by the Trustee, the landlords, pursuant to Section 77 B(b) (10), became vested with claims for damages for the injury resulting from such rejection. That right had accrued when the assignment agreements were made. Surrender and acceptance does not ex-
1164 tinguish accrued liabilities. In re Sherwoods, 210 Fed. 754, at 757 (cited by the majority opinion).

Accordingly, the accrued rights resulting from the rejection were not cut off by the assignment agreements any more than were claims for past accrued taxes or past due rent. Having survived surrender and acceptance, these rights likewise survived the release by virtue of the qualifying clauses preserving provable claims.

Whether the provable claims preserved relate only to the period intervening between the date of the formal rejection and the date of the assign-

ment agreements or pertain to the entire term is a question not arising on this appeal. It will 1165
arise when proof of claim is taken below.

In these cases also, the claims under the reasoning of the majority opinion should be allowed instead of rejected.

Section 77B Contemplates Surrender and Makes Landlords' Claims Provable Irrespective Thereof.

IV

The "surrender of the premises" upon which the Court based its decision is expressly recognized by 77B(b) (10) as not barring a landlord's claim for future rent. 1166

The Act expressly provides that for all purposes thereof "any person injured" by the "rejection"[4] (whether in a 77B proceeding or a proceeding pending prior to the institution thereof), of an "unexpired lease" shall be "deemed to be a creditor". "Creditors" are defined as including "all holders of claims of whatsoever character against the debtor or its property". In other words, creditors are holders of claims and a "person injured" by the rejection of an unexpired lease, being a creditor, is the holder of a claim.

Having definitely classified landlords under rejected leases as creditors, the Act then goes on to define the rank and the extent of such claim as follows: 1167

"The claim of a landlord for injury resulting from the rejection of an unexpired lease of real

[4] A trustee in bankruptcy does not in fact "reject", but merely fails to adopt a lease (In re Frazin. 183 Fed. 28, 32). Although there was formal notice of disaffirmance in 5 claims hereinbefore the assignment agreements were entered into, the failure of the Trustee to adopt any of the leases constituted a rejection in fact and law in all 9 cases.

estate *or* for damages or indemnity under a cove-
1168 nant contained in such lease shall be treated as a claim" ranking with 63(a) debts, but shall be limited to the rent "reserved by said lease for the three years next succeeding the date of *surrender of the premises to the landlord or* the date of reentry of the landlord, whichever first occurs, *whether before or after the filing of the petition*, plus unpaid rent accrued up to such date of *surrender or* reentry".

It seems perfectly clear that Congress intended that either injury resulting from rejection and surrender or damages incident to reentry under an indemnity clause should give rise to a claim
1169 provable under 77B. Otherwise the alternative manner of statement becomes meaningless. Yet it is this very "surrender of the premises" (and the majority opinion here uses the exact wording of the Statute) which the Court has held bars even those claimants who had riders attached to their agreements of assignment and release.

Since the Statute expressly fixes "the date of surrender" as a determinative factor in computing the amount of the claim, such surrender must have been contemplated in providing for the allowance of the claim. Otherwise careful provi-
1170 sion is being made for claims that can never exist and Congress is using a bar as an element of a measure. And the surrender referred to is one which occurs "before or after the filing of the petition".

In using the words "surrender of the premises" Congress adopted a phrase of broad implication and one which describes the situation "created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made". Gray v. Kaufman Dairy & I. C. Co.,

162 N. Y. 388, 394 (cited by the majority opinion). Later in the sentence, 77B uses the word "surrender" alone, in contrast with "re-entry". 1171

The words "injured" and "injury", employed in describing those who have claims arising from the rejection of unexpired leases, are obviously used simply to indicate pecuniary loss. The judge, trustee, or receiver referred to has, of course, a perfect legal right to reject the bankrupt's leases or to direct such rejection, as the case may be. But patently claims are limited to those who, after such rejection, are unable to lease the premises on such favorable terms as those embodied in the lease to the bankrupt, and hence are financially "injured by such rejection". 1172

That Congress intended injury resulting from either rejection or surrender or damages incident to re-entry under a covenant to give rise to a claim provable under Section 77B is further apparent from the legislative history of the Section. As it passed the House and was originally reported to the Senate, it provided that termination of the lease by forfeiture, re-entry, or otherwise should bar the claim, in the following words:

"In case any executory contract shall be rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach and such claim may be allowed *provided such contract shall not have been terminated by forfeiture, re-entry or otherwise.*"[5] 1173

As it was amended in the Senate and finally enacted, such provisions were eliminated and the present provisions of 77B were substituted therefor.

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[5] H. R. 5884, 73d Cong., 1st Sess., print of June 6, 1933, page 10, lines 12-14; H. R. 5884, 73d Cong., 2d Sess., print of March 15, 1934, page 10, lines 21-23.

The provision that claims should be barred by
1174 termination of the agreement was discarded. Congress substituted therefor the present elaborate provisions defining creditors and making claims for injury from rejection provable. The Congressional intent appears obvious.

The petitioners are flatly at issue with the proposition stated in the majority opinion (p. 10):

"While it is plain that claims for future rent are provable in 77B reorganization proceedings where they would not have been under the Act as it stood previously, it is equally plain that whatever change in this respect was made had to do only with the remedy. It is necessary to have a
1175 claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim in order to have a provable claim under Sec. 77B."

It appears that Section 77B changed not only the remedy but the right. The allowance of a claim "for damages or indemnity under a covenant contained in such lease" took care of the usual situation in which a landlord has a claim against a tenant after termination of the lease under the provisions thereof. But there would undoubtedly be numerous situations in many re-
1176 organizations, as in this one, in which the lease contained no covenant for damages or indemnity or in which a landlord might not exercise an option to terminate.

Under the Bankruptcy Act before Section 77B, the landlord under such circumstances would continue to have a claim against the tenant (the bankrupt) after the trustee's failure to adopt the lease. Since the bankrupt had no further connection with the estate this claim did not affect the administration of the estate.

But in reorganization of a debtor it is necessary to eliminate this continuing interest. Section

77B has accordingly provided in addition to a claim under a covenant that "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate" shall be provable limited to the rent "for the three years next succeeding the date of surrender". This rejection under 77B must terminate the landlord and tenant relation and the lease agreement in order to eliminate the continued liability of the debtor. The purpose of the act is completely to dispose of all old obligations. Unless all these claims, whether arising under leases without a covenant or under leases with a covenant, can be eliminated, the debtor can not be effectively reorganized. The statute had to provide for compensation on the termination of leases which did not contain covenants for damages as well as for leases which did contain such covenants. Otherwise the statute would be unconstitutional. Section 77B accordingly takes care of both kinds of leases by providing in one case for "damages or indemnity under a covenant" and in the other "for injury resulting from the rejection of an unexpired lease". It follows that even without a surviving covenant, i. e., without any rights "which the substantive law of landlord and tenant recognizes" (op. p. 10), the landlord under a rejected lease, nevertheless, has a provable claim under 77B because of the rejection. 1177 1178 1179

Section 77B therefore, not only changed the remedy as to proving claims under covenants, but created a new right of landlords where no claim under a covenant existed.

It may be that the majority opinion is in accord with the foregoing argument but reached its conclusion on the assumption stated in its opinion that "none of the claims arose from the rejection of leases" (op. p. 11). But in five instances herein

there were formal rejections before assignment
1180 agreements were entered into (cf. Point III, supra), and under the rule of In re Frazin, 183 Fed. 28, 32, in all nine claims there were rejections in law.

If the Court does not agree with the reasoning of this last Point IV we again respectfully call to its attention that on the basis of the present holding and opinion without change, the six claims discussed in the first three Points (pp. 3-9 of this petition) are, on their particular facts, entitled to allowance.

Upon the aforestated grounds, the appellants herein mentioned respectfully pray for a rehear-
1181 ing herein to the extent hereinbefore set forth.

Respectfully submitted, Gilbert, Diamond & Brandeis, Attorneys for Appellants. Milton Diamond, Emanuel Feldberg, Murray C. Bernays, Henry Gale, Of Counsel.

Certificate of Counsel

STATE OF NEW YORK,
County of New York, ss:

1182 Milton Diamond, being duly sworn, deposes and says: That he is a member of the firm of Gilbert, Diamond & Brandeis, attorneys for the appellants herein, and that the foregoing petition for rehearing is presented in good faith and not for delay.

Milton Diamond.

Sworn to before me this 21st day of April, 1936. Etta Goldschlager, Notary Public. N. Y. Clk's No. 392, Reg. No. 8 G 217. Kings Co. Clk's No. 167, Reg. No. 8174. Commission expires March 30, 1938.

Opinion on Petition For Rehearing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935 1183
Petition Filed April 21, 1936. Decided

July 6, 1936

No. 289

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

JOSEPH E. OTIS ESTATE LAND TRUST et al., Appellants,

IRVING TRUST COMPANY, as Trustee; UNITED CIGAR STORES COMPANY OF AMERICA, Landlords' Protective Committee, Preferred Stockholders' Protective Committee, Debentureholders' Protective Committee, Jacob Ruppert Realty Corporation and United Stores Corporation, Appellees 1184

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Gilbert, Diamond & Brandeis, of New York City, for appellants.

On Petition for Rehearing 1185

Per CURIAM:

As the petition correctly points out, there were three riders not absolutely identical with the one quoted in the opinion. That used in the assignment of the lease which forms the basis of the Lorch claim No. 5286 provided that the instrument was not to operate to merge the term with the reversion. The one relating to the claim of Isidor A. and Flora L. Rubel and that relating to the claim of Livingston, Nos. 5312 and 5406 respectively, were not expressly limited to the modi

fication of the general release contained in article 5, but their effect applies to each entire agree-
1186 ment; that is to say, the claimants expressly provided against the waiver of whatever right to prove the claims against the bankrupt estate the bankruptcy court might decide that they had. The meaning of such a provision, like the meaning of any contract, is to be gathered from the intent expressed in the words used taken in the light of the surrounding circumstances. Ohio Valley Pulley Works v. Oneida Steel Pulley Co. (C. C. A.) 271 F. 57. The parties were contracting in view of the then existing uncertainty as to the provability in bankruptcy of claims for future rent which was not dispelled until some two years
1187 later by the decision in Manhattan Properties, Inc. v. Irving Trust Co., 291 U. S. 320, 54 S. Ct. 385, 78 L. Ed. 824. They spoke in terms of the reservation of existing rights to be adjudicated in the future by a court of bankruptcy with reference to the provability of claims against a then adjudicated bankrupt that of course were provable, if at all, only when filed within the time then allowed and as of the time they were filed. A majority of the court believes it would do violence to the language chosen to construe the words in their setting to mean the same as though the
1188 parties had actually said in effect, not only that all then present rights to prove in bankruptcy were to be preserved, but that the claimants might have the advantage of any change in the bankruptcy law which Congress might make in the future. This would, indeed, have been contracting on the basis of a mere guess both as to the fact of any actual change in the statute and as to what it would be. Had the parties really intended to enter into arrangements so uncertain and of such comparatively little use in furtherance of the patent desire to arrange matters so that, if possible, the business could be continued with-

out liquidation, it would have been so easy to have said so in a few plain words that the failure to use them leads a majority of the court to the con- 1189
clusion that they made their agreements subject only to such future interpretation of the then existing law as should authoritatively be made to apply to the provability of the claims. The natural and reasonable meaning of the language used is the meaning to be given it. C. H. Pope & Co. v. Bibb Mfg. Co. (C. C. A.) 290 F. 586; Bijur Motor Lighting Co. v. Eclipse Mach. Co. (C. C. A.) 243 F. 600; Hunt v. Triplex Safety Glass Co. (C. C. A.) 60 F. (2d) 92.

The assignment of the lease involved in the claim of Brown, No. 5341, was not to the landlord by name but was apparently to the land- 1190
lord's nominee, a circumstance which did not change its effect.

Petition denied.

Order Denying Petition For Rehearing.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 6th day of July, one 1191
thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor,

JOSEPH E. OTIS ESTATE LAND TRUST et al.,
Appellants

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof it is

1192 Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Company of America. Order. United States Circuit Court of Appeals, Second Circuit. Filed July 6, 1936. William Parkin, Clerk.

Clerk's Certificate.

1193 UNITED STATES OF AMERICA,

Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of United Cigar Stores Company of America, Debtor: Joseph E. Otis Estate Land Trust et al., Appellants, as the same remain of record and on file in my office.

1194 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk, by D. E. Roberts, Deputy Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

Stipulation as to Diminished Record in the Supreme Court of the United States.

1195

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1936.

No. 436.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

1196

JOSEPH E. OTIS ESTATE LAND TRUST, et al.,
Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, et al.,
Respondents.

IT IS STIPULATED AND AGREED that the record may be diminished by deleting all testimony and proofs as to all 85 claims as to which certiorari was not granted, and as so diminished, the foregoing record is a true transcript of the record in the Circuit Court of Appeals for the Second Circuit:

1197

IT IS FURTHER STIPULATED AND AGREED, by and among the attorneys for the respective parties hereto that as so diminished, the foregoing is a true and complete transcript of the record of the Circuit Court of Appeals for the Second Circuit as agreed upon by the parties, relating to the

1198

nine claims as to which certiorari has been granted.

Dated, New York, December 3rd, 1936.

SUSAN BRANDEIS,
Counsel for Petitioners.

WILLIAM D. WHITNEY,
Counsel for Trustee of the Debtor.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

1199

MITCHELL, TAYLOR, CAPRON & MARSH,
and
RALPH MONTGOMERY ARKUSH,
Attorneys for Landlords' Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

MILBANK, TWEED, HOPE & WEBB,

1200

Attorneys for Phoenix Securities Corporation.

SHEARMAN & STERLING,
and
BERLE & BERLE,
Attorneys for Preferred Stockholders' Protective Committee.

WRIGHT, GORDON, ZACHRY & PARLIN,
Attorneys for Reorganization Committee.

United States Supreme Court Order Granting Writ.

1201

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 16, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted in relation to the nine claims enumerated on page two of the petition for certiorari, being those involving qualified releases, and the case is assigned for argument immediately following Nos. 151 and 260.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8470-C)

1203

FILE COPY

OCT 5

CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

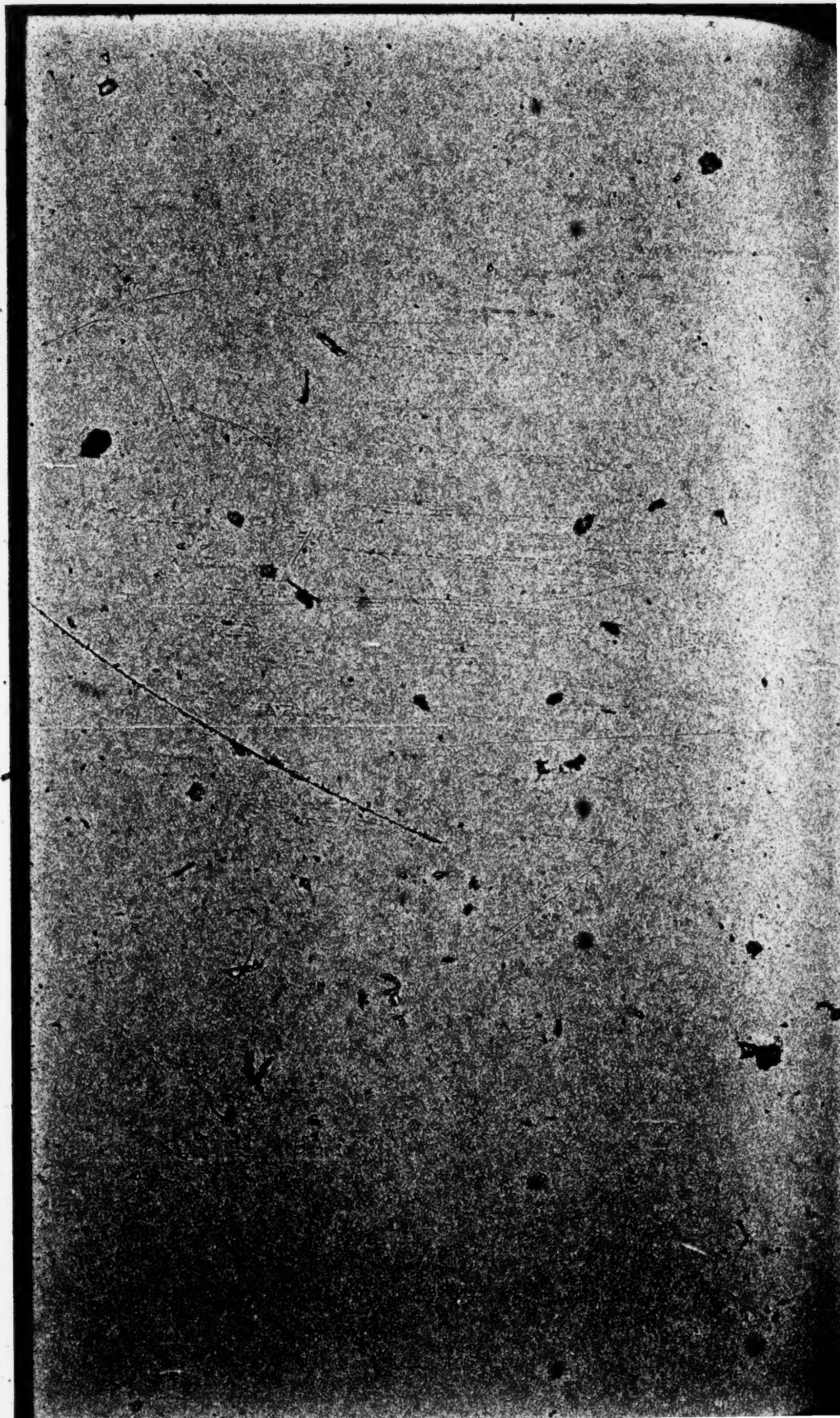
—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUSAN BRANDEIS,
Counsel for Petitioners.

THE COURT PRESS, N. Y. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. .

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, the Joseph E. Otis Estate Land Trust, together with 93 other petitioners, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on July 6, 1936, affirming, by a divided court, an order of the District Court for the Southern District of New York, disallowing 94 landlords' claims under Section 77B of the Bankruptcy Act "for injury resulting from the rejection of an unexpired lease * * * or for damages or indemnity under a covenant * * * in such lease", "re-

jected by a trustee * * * in a proceeding pending prior to" the enactment of Section 77B, in which reorganization proceedings under Section 77B were subsequently instituted.

Questions Presented.

1. Whether Section 77B of the Bankruptcy Act makes provable "the claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate" as a new right in bankruptcy, separate and distinct from any claim "for damages or indemnity under a covenant", and which is not identical with and does not depend for its existence on a claim enforceable under applicable State law at time of filing the petition.[1]

2. Whether in proceedings under Section 77B of the Bankruptcy Act a landlord may prove a claim for injury resulting from the rejection of his lease in the prior bankruptcy proceeding in which the 77B petition was filed when the landlord after rejection and "before * * * the filing of the petition" and the enactment of Section 77B has obtained possession by the "surrender of the premises to the landlord or * * * reentry of the landlord."[2]

[1-2] Determination as to the following claims herein depends squarely upon these questions:

Number	Claim	3 Year Claim
5235	Excell Trustees	$28,382.92 (R. 480)
5277	Wm. E. and Warren H. Munk	46,707.33 (R. 251)
5286	Simon Lorch	107,941.99 (R. 317)
5302	Louise S. Whitcomb and Florence Welch	12,661.11 (R. 446)
5304	Abe and Myrtle Schwartz	62,626.08 (R. 241)
5312	Isidor A. and Flora L. Rubel	49,127.33 (R. 405)
5341	Thos. H. Brown *et al.*	103,917.10 (R. 380)
5406	Herbert and Sigmund Livingston, as Trustees	24,567.36 (R. 354)
5421	J. E. Nunn	33,696.35 (R. 344)

These questions are also fundamental in determining the remaining 85 claims.

3. Did the majority of the Court of Appeals err in holding, in four of the 94 claims, that the landlords had no provable claims under Section 77B where the trustee in the prior bankruptcy proceedings in which the 77B proceedings were taken, had rejected[3a] or had not affirmed[3b] the leases[3c] and the landlords had obtained possession of their premises under agreements providing (a) that the landlord should take possession of the premises and that the trustee and the bankrupt should be released from all claims, but (b) that nothing in the agreements should constitute a waiver[3d] by the landlord of the right "to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled".

4. Did the majority of the Court of Appeals err in holding, in 6 of the 94 claims, that the landlords had no provable claims under Section 77B where the Trustee in the prior bankruptcy proceedings in which the 77B proceedings were taken had rejected[4a] or had failed to affirm[4b] the leases[4c] and the landlords had obtained possession of their premises under agreements providing in effect for surrender of possession to the landlord and the release of claims against the

---

[3a] 5406 Herbert and Sigmund Livingston, as Trustees.
5341 Thos. H. Brown, *et al.*

[3b] 5286 Simon Lorch.
5312 Isidor A. and Flora L. Rubel.

[3c] A trustee does not "reject" but merely fails to affirm (*In re Frazin*, 183 Fed. 28, 32). It is submitted that the making of the agreements herein constituted a rejection even in cases in which the lease was not formally rejected.

[3d] In the Rubel and Livingston claims by express language; in the Lorch claim by providing against merger and in the Brown claim by assignment to a party other than the landlord.

[4a] Nos. 5235, 5277, 5302, 5341, described more particularly in footnote 1, page 2.

[4b] Nos. 5304 and 5421, described more particularly in footnote 1, page 2.

[4c] See note [3c] *supra*.

Trustee and the bankrupt, but further providing that the release should not "be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled."

5. Where a lessor by agreement with an adjudicated bankrupt tenant yields up rights against the bankrupt tenant and its estate in bankruptcy, and a new law (77B) is subsequently enacted creating a new status for landlords' claims and for the rights of the bankrupt with respect to the bankrupt estate, can the bankrupt avail itself of this new status with respect to its estate without also permitting the landlord to assume a new status with respect to the bankrupt (debtor) estate, despite the agreement made in the prior bankruptcy proceedings before the enactment of the new law?

Reasons for Granting the Writ.

The question of the proper interpretation of the provisions of Section 77B relating to landlords' claims is an important question of Federal Law which has not been, but should be, settled by this Court.

This question is substantial. It is involved both in all the many bankruptcy proceedings of corporations operating chain stores pending at the time when Section 77B was enacted, which were initiated largely to relieve such corporations from liabilities under leases[5] and the many reorganization proceedings of similar corporations since the enactment of Section 77B. It is desirable that this Court should pass upon these provisions at this time for the guid-

[5] Congressman Celler (76 Con. Rec. Pt. 2, p. 1360).

ance of Bench and Bar and to assure uniformity of interpretation among the various Circuits.

The decision of the Circuit Court of Appeals herein raises two issues going to the essence of landlord's claims under Section 77B of the Bankruptcy Act.

(a) 77B provides for landlord claims "for injury resulting from the rejection of an unexpired lease of real estate **or** for damages or indemnity under a covenant contained in such lease". The decision herein limits the law to "a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (R. 787). Under this ruling, in effect, only "damages or indemnity under a covenant" may be claimed as only such claims are recognized by "the substantive law of landlord and tenant". "Injury resulting from the rejection of an unexpired lease," despite the express language of the statute, is ruled out of it.

The ruling of the Court of Appeals not only vitally affects a great group of landlord claims herein[6] (R. 2 to 5) and in other 77B proceedings but leaves reorganization under 77B in confusion. If the rejection of leases containing no covenant of indemnity gives the landlord no claim in 77B, the tenant-debtor must continue bound by the lease as was formerly the case under the Bankruptcy Act before the passage of 77B, unless the landlord's rights have been unconstitutionally destroyed entirely. Such continued liability of the tenant-debtor would render its reorganization difficult or, in those cases where

[6] The three year claims of the 94 petitioners herein amount to $1,667,995.66. Similar claims in these proceedings far in excess of this depend on the outcome of this appeal by stipulation or by reason of similarity of the facts.

lease difficulties precipitated the 77B proceedings, impossible. Obviously one major purpose of 77B was to marshall all possible claims against the tenant-debtor,—even those of stockholders,—in one proceeding so that the debtor might be completely and effectively reorganized. If the ruling herein is correct with its corollary that the tenant-debtor remains bound by leases for whose rejection no claim may be made in 77B, that object has failed.

(b) Under the decision of the Circuit Court of Appeals provable claims in 77B do not survive surrender of the premises and re-entry. The statute, however, provides that the amount of a landlord's claim for rejection shall be limited to an amount not to exceed the rent reserved by the lease for the three years next succeeding "the date of surrender of the premises * * * or the date of re-entry * * * whether before or after the filing of the petition." In short, the statute says the amont of a landlord's claim shall be measured from the date of the happening of an event which the Court herein has said destroys the claim. Obviously this issue is a vital one occurring in every 77B proceeding which involves a lease, which is the equivalent of saying in every one.

If additional grounds for granting certiorari herein be necessary, they are furnished by the decision of the same Court (the Circuit Court of Appeals for the Second Circuit) in this same proceeding *In re United Cigar Stores Co. of America* (*Kuhner-Fisher*) decided July 14, 1936 not yet reported. In that case the same Court *allowed* a landlord's claim although that landlord had no claim against the debtor "which the substantive law of landlord and tenant recognizes as an enforceable claim." That decision (discussed in the brief ap-

pended hereto) is in conflict with the decision herein and further confuses the law on this subject.

That certiorari should be granted here is indicated by the statement of Judge Learned Hand in writing for the Court in the above-mentioned Kuhner-Fisher case when, referring to the provisions of 77B relating to landlord claims and the Congressional bills out of which they arose he says "It is very difficult to know what the section really means as it finally did emerge."

WHEREFORE, it is respectfully submitted that this petition should be granted.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
by SUSAN BRANDEIS,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Delivered in the Court Below.

The Special Master's Report is found at R. 739.

There was no opinion in the District Court.

The majority and dissenting opinions in the Circuit Court of Appeals are reported in 83 F. (2d) 202 and are found at R. 780, 788.

The petition to the Circuit Court of Appeals for rehearing on behalf of certain appellants is found at R. 791. The majority opinion in the Circuit Court of Appeals on the petition for rehearing is found at R. 803.

The opinions in cases of similar issues, heard and decided at the same time, and in which petitions for writs of certiorari are now pending, are reported as follows:

In re United Cigar Stores Co. of America (Mrs. John S. Meadows, appellant), 83 F. (2d) 207 (Petition for Writ of Certiorari—No. 151, October Term, 1936);

In re United Cigar Stores Co. of America (City Bank Farmers Trust Co., appellant), 83 F. (2d) 209 (Petition for Writ of Certiorari—No. 260, October Term, 1936).

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a) and Sec-

tion 25(c) of the Bankruptcy Act. The order for mandate was entered April 13, 1936 (R. 791). The petition for rehearing was denied by order of the District Court filed July 6, 1936 (R. 806).

Summary Statement of Matter Involved.

Facts.

The United Cigar Stores Company of America, a New Jersey Corporation, owned a chain of retail stores national in its scope. It held about 1,000 burdensome leases, which constituted one of the reasons for its financial difficulties, and resulted in the filing of a voluntary petition in bankruptcy on August 29, 1932 (R. 501-505). The Irving Trust Company, the Trustee in bankruptcy of the Debtor, made new agreements with many of the landlords, and abandoned other leases, using printed forms of agreements in most cases (R. 505, 508) (Claimant's Exhibits 1, 2, 3, 4, 5, 6, R. 65, 70, 76, 80, 86, 90). The form agreements usually used recited the bankruptcy of the United. About 630 new leases with landlords were negotiated upon these forms (R. 744). A number of these landlords have filed claims in these proceedings. Many have stipulated to abide by the result of the court's decision in the instant appeal. The agreements variously provided for modification and/or assignment of the old leases and for a release of the landlord to the trustee, the bankrupt, and the bankrupt estate (R. 506, 7, 8). In nine cases the lessors did not waive the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled (R. 241, 251, 317, 344, 354, 380, 405, 446, 480). In 85 cases the landlord gave up rights against the bankrupt and the bankrupt estate.

On June 7, 1934 Congress enacted Section 77B as an amendment to the Bankruptcy Act, after the execution of all 94 assignment agreements.

On June 9, 1934, while the prior bankruptcy proceeding was still pending, the bankrupt filed its petition under the newly enacted Section 77B. In due course the bankruptcy proceedings were succeeded by the new 77B proceedings, and the bankruptcy estate became the debtor's estate in 77B proceedings.

The 94 landlord appellants filed claims in the 77B proceedings pursuant to the provisions of 77B (b) (10) for "injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant" in such a lease, for injury or damages incurred in a proceeding pending prior to the institution of proceedings under 77B.

The Special Master recommended that the claims be disallowed (R. 739), and his report was confirmed by the District Court (R. 752). A majority of the Court of Appeals affirmed (R. 780, 788). A petition for rehearing was denied on July 6, 1936 (R. 803).

Statutes Involved.

The statutes are set out in an appendix at pages 23 to 25.

Specifications of Errors.

The Circuit Court of Appeals erred in finding that:

1. 77B changed only the remedy as to the proof of claims, and not the right of claimant.

2. A reservation of a right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled, is not a reservation of rights to prove future rent claims against the estate of the debtor in reorganization under a subsequently enacted statute (77B) invoked by the bankrupt.

3. The qualifying riders preserved only then present rights in bankruptcy, but not rights recognized by any change in the bankruptcy law which Congress might make in the future.

4. The reservations in nine claims reserved future rent claims made provable by judicial determination but not by subsequent legislation.

5. The bankrupt could change its status with relation to its bankruptcy estate by the application of 77B proceedings, to the exclusion of the landlord from a new status in the 77B proceedings, the exclusion based on an agreement with the bankrupt made *prior* to enactment of 77B.

6. The debtor may avail itself of defenses acquired as a bankrupt in bankruptcy proceedings pending prior to the enactment of 77B, in proceedings subsequently brought by the bankrupt under 77B.

7. A claim for damages did not relate back to the lease, under a proper construction of the statute.

8. None of the claims arose from the rejection of leases.

9. A surrender and acceptance resulted from the assignment by the tenant-bankrupt to a person other than the landlord.

10. In affirming the order of the District Court.

Argument.

POINT I.

Section 77B makes provable a claim for "injury resulting from the rejection of an unexpired lease of real estate" as an alternative to and separate and distinct from a claim "for damages or indemnity under a covenant contained in such lease". This is a new right in bankruptcy which is not identical with and does not depend for its existence on a claim enforceable under applicable state law at time of filing the petition.

The majority of the Court of Appeals based its decision herein on the proposition:

> "While it is plain that claims for future rent are provable in 77B reorganization proceedings where they would not have been under the Act as it stood previously, it is equally plain that whatever change in this respect was made had to do only with the remedy. It is necessary to have a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim in order to have a provable claim under Sec. 77B. That section does not extend the liability of a lease beyond what it otherwise would be under applicable law."

The majority of the court goes on to state by inference that the claims provable under 77B are only the identical claims which the landlords would have outside of bankruptcy. Your petitioners submit that this is an erroneous interpretation of a vital point in the law, the text of which is set out below.[7]

---

[7] The Act expressly provides that for all purposes thereof "any person injured" by the "rejection" (whether in a 77B proceeding or a proceeding pending prior to the institution thereof), of an "unexpired lease" shall be "deemed to be a creditor". "Creditors" are defined as including "all holders of claims of

(Continued on page 14.)

True, the landlords may have, or may be able to create by re-entry, claims under their leases which are presently enforceable under applicable state law. If the lease contains a covenant under which the parties have created, in place of the rent obligation,[8] a new "claim against the debtor which the substantive law of landlord and tenant recognizes as an enforceable claim", Section 77B makes that claim provable (subject to the three years limitation).

But the landlord may be injured without having such a claim:

(a) where the lease contains no covenant or

(b) where the covenant is in such form that the substantive law of landlord and tenant does not recognize it as enforceable, except at an impossibly remote period,[9]

or conversely, the landlord may refuse to act under the lease and attempt to enforce the tenant's continuing liability for rent, which survives rejection, a

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whatsoever character against the debtor or its property". *I. e.*, creditors are holders of claims and a "person injured" by the rejection of an unexpired lease, being a creditor, is the holder of a claim.

Having definitely classified landlords under rejected leases as creditors, the Act then goes on to define the rank and the extent of their claims as follows:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate *or* for damages or indemnity under a covenant contained in such lease shall be treated as a claim" ranking with 63(a) debts, but shall be limited to the rent "reserved by said lease for the three years next succeeding the date of *surrender of the premises to the landlord or* the date of reentry of the landlord, whichever first occurs, *whether before or after the filing of the petition,* plus unpaid rent accrued up to such date of *surrender or* reentry."

[8] *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 321, 338.

[9] *Hermitage Co.* v. *Levine*, 248 N. Y. 433.

procedure which would at least seriously interfere with reorganization.

Since, under the Bankruptcy Act prior to Section 77B, the claims for rent, or under such a covenant, continued to exist against the tenant-bankrupt, and since the tenant-bankrupt no longer had an interest in the estate, no provision for such claims in bankruptcy was necessary.

But to effect reorganization, the reorganizer must be able to relieve the tenant-debtor of these continuing claims, even against the will of the landlord. Arbitrarily to destroy them would violate the due process clause. Furthermore, to permit participation by stockholders without provisions for landlords' claims would raise serious constitutional questions under the *Boyd* case.[10] Section 77B had therefore to provide both for termination of this interest and for compensation to the landlord on such termination.

Section 77B effected this result and at the same time eliminated the foregoing questions as to the constitutionality of the statute by providing for claims in the alternative against the debtors assets. Where, as a practical matter, the landlord's claim can be measured by the agreements of the parties, Section 77B enforces such agreements by giving a claim "for damages or indemnity under a covenant". But where the damages cannot be determined by application of the State law, Section 77B gives an alternative claim "for injury resulting from the rejection". That this alternative claim for injury is constitutional is argued under Point III hereof.

Refusal of the majority of the Court of Appeals to interpret the Act in this manner renders nugatory the alternative provisions for landlords' claims and the grant of a claim when the lease "shall have been

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[10] *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482.

rejected by a trustee * * * in a proceeding pending prior to * * * a proceeding under this section", measured from the date of surrender or re-entry.

The result arrived at is the more astonishing, since the same Circuit Court of Appeals in another claim in this proceeding (*In re United Cigar Stores Co. of America* (*Kuhner-Fischer*), *C. C. A. 2nd Cir.* July 14, 1936, not yet reported) *did* allow a claim, although the landlord had no "claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim." In that case, liability had accrued by the landlord's re-entry under a covenant of indemnity in the lease. The covenant provided that the tenant would "indemnify the landlord against all loss for rent which the landlord may incur by reason of such termination during the residue of the term." Under this form of covenant the State law granted no relief until the end of the original term of the lease.[11] *The Court did not grant damages or indemnity under the covenant, but instead gave the alternative claim for injury resulting from rejection, by liquidating the claim like a claim for damages for breach of an executory contract; that is by discounting the future payments and subtracting the appraised value of the term from their sum.*

In the *Kuhner Fischer* case, the Court correctly applied Section 77B. But it construed the statute in direct contradiction to its application of Section 77B herein.

POINT II.

The claim for injury resulting from the rejection of a lease is expressly made to survive surrender.

Section 77B provides that a landlord's claim for rejection shall be limited to an amount not to exceed

[11] *Hermitage Trust Co. v. Levine*, 248 N. Y. 433.

the rent reserved by the lease for the three years next succeeding "the date of surrender of the premises[12] * * * or the date of re-entry * * * whether before or after the filing of the petition." Since the claim is measured from the date of surrender or re-entry, surrender or re-entry is a condition precedent to proving the claim.

Until surrender or re-entry, there can be no claim against the assets because, until the debtor's or the trustee's failure to affirm, the debtor continues to be liable for rent. Only upon the termination of this continuing liability can it be determined whether the landlord has been injured at all,[13] and, if injured, to what extent.

Congress carefully provided in Section 77B that the claim of landlords made provable thereby should include landlords of corporations already in bankruptcy at the passage of the Act. An important reason for the inclusion of landlords' claims was the series of then pending bankruptcy proceedings instituted largely to dispose of lease liabilities.[14] The Act, by its terms, leaves no room for doubt on the subject. In addition to measuring the amount of the landlords' claim from the date of surrender or re-entry "*whether before or after the filing of the petition* * * *", it is provided that the landlord should have a claim in the event that his lease "shall have been rejected by a

[12] The phrase "surrender of the premises" is the equivalent of surrender of the term. *Gray* v. *Kaufman Dairy & I. C. Co.*, 162 N. Y. 388, 394 (cited by the majority opinion in the instant *Otis* case).

[13] *Manhattan Properties Inc.* v. *Irving Trust Co.*, 291 U. S. 321, 331.

[14] The Celler Bill making landlords' claims provable in bankruptcy, introduced by Representative Celler, was directed particularly against the United Cigar Stores bankruptcy among others. 76 Congressional Record, Part II, page 1360.

trustee or receiver in bankruptcy * * * *in a proceeding pending prior to the institution of a proceeding under this section* * * *". It provided also (Sec. 77B (p)) that reorganization proceedings could be "taken in proceedings in bankruptcy * * *" pending on the effective date of Section 77B.

The fact that Congress intended landlords' claims to survive surrender, particularly in pending bankruptcies, further appears from the circumstance that as originally passed by the Senate, the Act provided:

> "In case any executory contract shall be rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach and such claim may be allowed *provided such contract shall not have been terminated by forfeiture, reentry or otherwise.*"[15]

The contrast between this bill and the Act as finally passed makes the Congressional intent entirely plain.

POINT III.

Granting a provable claim for injury resulting from the rejection of a lease does not violate the constitution.

Section 77B regulates the distribution of the assets of a debtor in the possession of the Bankruptcy Court. It does not attempt to change the substantive law of landlord and tenant.

No constitutional rights of a debtor or of any creditors or stockholders are violated by granting the

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[15] H. R. 5884, 73d Cong., 1st Sess., print of June 6, 1933, page 10, lines 12-14; H. R. 5884, 73d Cong., 2d Sess., print of March 15, 1934, page 10, lines 21-23.

landlord the right to prove a claim for damages sustained by him because of the rejection of his lease.

It is well settled that Congress, in the exercise of the bankruptcy power, may both authorize the enforced transfer or the sale of collateral security free from liens thereon[16] and provide for priorities.[17] Exercise of such powers necessarily changes the rights which creditors would have under applicable State law, and in the interests of equitable distribution provides for the application of assets to discharge claims in an entirely different manner from the State law. Creditors are thereby deprived of substantial rights, but since the deprivation is incidental to the bankruptcy power, the constitution has not been violated.

In Section 77B, Congress has merely granted landlords the right to participate with other creditors in the debtors' assets in reorganization, in place of the corresponding claim which they had against the debtors' assets prior to reorganization, and of which they were deprived when the Bankruptcy Court took possession of such assets. It seems clear that Congress has power to do this. This Court has already stated that Congress may make claims for future rents provable.

> "The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act."[18]

This reasoning is *a fortiori* true when applied to estates which were in bankruptcy at the time Section

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[16] *In re Central Funding Corp.*, C. C. A. 2nd, 75 Fed. 2nd, 256; See *In re Prudence Bonds Corp.*, C. C. A. 2nd, 75 Fed. 2nd, 262; See *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 227.

[17] *In re Inland Dredging Corporation*, 61 F. (2d) 765; *City of Chelsea* v. *Dolan*, 24 F. (2d) 522.

[18] *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 321, 332.

77B was passed. The proceeding under Section 77B is "an amplification or new end product of the original bankruptcy just as though the bankrupt or alleged bankrupt had proposed a composition".[19] The debtor had no constitutional right to reorganize under Section 77B. Congress could have provided that the Section was effective only as to corporations not in bankruptcy. It therefore could impose as a condition of the debtor's enjoying the benefits of the Section, a recognition of landlords' claims. This is all that it did.

POINT IV.

The claims reserved in the nine qualified releases herein were those made provable by Section 77B.

Three landlords herein repossessed their premises under agreements which "expressly provided against the waiver of whatever right to prove the claims against the bankrupt estate the bankruptcy court might decide that they had" (Op. on Petit. for Rehearing, R. 804).[20]

Six additional landlords repossessed their premises under agreements providing for surrender of the premises to the landlord, and for the release of the bankrupt and the trustee from all liability, but with a rider to the release provision, the typical form of which provided:[21]

> "Nothing in this article shall be deemed a waiver by the Landlord of the right to prove

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[19] *In re Paramount Publix Corp.; Greenberg* v. *Paramount Pictures Inc.*, C. C. A. 2nd Cir., July 20, 1936, not yet reported.

[20] Nos. 5286 (Lorch), 5312 (Rubel), and 5406 (Livingston).

[21] Nos. 5235 (Excell); 5277 (Munk); 5302 (Whitcomb); 5304 (Schwartz); 5341 (Brown), and 5421 (Nunn).

against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable one which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim, or preclude the Trustee from contesting such proof and allowance."

Judge A. Hand, in his dissenting opinion below (R. 788, 83 Fed. (2d) 202, 206), held that the effect of this rider was "to reserve against the bankrupt's estate any claims which existed but for the surrender and general release" (R. 789, 83 Fed. (2d) 207). The Special Master (R. 745) made the same ruling, but held that the landlords intended to reserve the claims if judicial decision made them provable but not if legislative sanction did so. Judge Hand was unable to perceive this fine distinction. Your petitioners submit that the ruling of the majority is a flat contradiction of the plain words and obvious intent of the parties.

Although this question alone may not be sufficient reason for this Court to grant certiorari herein, your petitioners urge it as substantial additional grounds for the writ.[22]

The nine qualification claimants did release the bankrupt, which remained as an empty shell after the bankruptcy, but reserved all rights against the bankrupt's assets.[23] Two days after 77B was enacted,

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[22] The nine claims total $469,627.57 (three year claims). Additional claims greatly in excess of this amount are to be expunged if this petition is denied, or will be vitally affected by the decision herein.

[23] They signed, under urgent solicitation by the Trustee, agreements prepared by the trustee. By thus complying with the trustee's wishes, they have, it has so far been held, deprived themselves of the rights given landlords who refused to cooperate with the Trustee but resorted to legal action.

the bankrupt (become the debtor) stepped into the zone of reorganization, a small area in the bankruptcy domain. It claims, so far successfully, that by so doing it freed assets subject to the claims in the bankruptcy proceeding from such claims in a subsidiary proceeding "taken in" the bankruptcy proceeding.

Your petitioners believe that the decision below violates the agreement of the parties, the proper interpretation of Section 77B, and the plain equities of the situation. They pray for an opportunity to argue this question from the text of the agreements and the Bankruptcy Act as they cannot do here because of space limitation.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

APPENDIX.

(1) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 563, as amended July 7, 1934, C. 424, 48 Stat. 912; as amended August 20, 1935, C. 577, 49 Stat. 664; August 29, 1935, C. 809, 49 Stat. 965:

"SEC. 77A. *Additional Jurisdiction.*—In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act" (U. S. C. A., Title 11, Sec. 206).

"SEC. 77B * * * (b) * * * (10) * * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim

ranking on a parity with debts which would be provable under section 63(a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *" (U. S. C. A., Title 11, Sec. 207).

"SEC. 77B * * * (o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved" (U. S. C. A., Title 11, Sec. 207).

"SEC. 77B * * * (p) This section shall take effect and be in force from and after the date of the approval of this amendatory Act and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act" (U. S. C. A., Title 11, Sec. 207).

(2) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 562:

"SEC. 12 (e) Upon the confirmation of a com-

position, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided" (U. S. C. A., Title 11, Sec. 30).

"SEC. 63. *Debts which may be proved.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate" (U. S. C. A., Title 11, Sec. 103).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF.

SUSAN BRANDEIS,
Counsel for Petitioners.

THE COURT PRESS, N. Y. C.

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PETITIONERS' REPLY BRIEF.

This Court Has Already Granted a Review in the Companion Cases to This Cause.

Petitions for certiorari were granted on October 26, 1936, in City Bank Farmers Trust Company, petitioner, against Irving Trust Company, *et al.*, respondents, No. 260, and Mrs. John S. Meadows, petitioner, against Irving Trust Company, *et al.*, respondents, No. 151. The said two cases and the instant case were argued, submitted and decided together below.

In fact the said two cases were decided on the authority of the instant case.[1] The issues involving the interpretation of Section 77B of the Bankruptcy Act in all three cases are similar and in part identical.

In the light of the reviews granted, there can no longer be a question that the issues presented in the instant case are of a character properly to be reviewed by this Court.

This Court Has Complete Jurisdiction.

I. The brief in opposition asserts that all 94 claims are not properly before the Court on the petition filed. The petition here is entitled exactly as were the orders of the lower Court disposing of the issues herein (R. 791, 806). Respondents may not now treat as separate matters that which was litigated and disposed of below as a whole. The Court is not required to search the record as the petition seeks a review of a single order covering all 94 claims. The names of all the petitioners appear at Record 2, 3, 4, 5, and a stipulation shortening the record appears at Record 699 *et seq.*

If the respondents' position on this subject were well taken, it would have been necessary to burden this Court with 94 separate petitions to review a single order.

II. When the petition for rehearing herein was filed with respect to the single order entered, it

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[1] *In re United Cigar Stores Co. of America (City Bank Farmers Trust Co., appellant)*, 83 F. (2d) 209. *In re United Cigar Stores Co. of America (Mrs. John S. Meadows, appellant)*, 83 F. (2d) 207.

stayed the mandate under Rule 26 of the Circuit Court of Appeals for the Second Circuit. The order sought to be reviewed did not become final until the entry of the order denying the motion for a rehearing. This Court has held that the limitation on the time to file a petition does not begin to run until the order denying a motion for rehearing has been entered.[2] The respondents did not move to sever the claims in the Court below, nor did the Court do so of its own motion. The petition for reargument was directed to the single order which had been made. It was disposed of by a single order.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

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[2] *United States* v. *Ellicott*, 223 U. S. 524, 539; 56 L. Ed. 535.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONERS

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Of Counsel.

THE COURT PRESS, N. Y. C.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions below officially reported are those of the Circuit Court of Appeals for the Second Circuit at 83 Fed. (2d) 202, and on rehearing 85 Fed. (2d)

Italics throughout supplied unless otherwise indicated.

11. The report of the Special Master (affirmed by the District Court without opinion, R. 337) appears in the Record at pages 324 *et seq.*

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The order for mandate of the Circuit Court of Appeals was entered April 13, 1936 (R. 379). The petitioners' petitions for rehearing were denied by the Circuit Court of Appeals by an order dated July 6, 1936 (R. 397). The petition for certiorari was filed October 5, 1936 and granted November 16, 1936.

STATEMENT OF THE CASE.

FACTS.

On August 29, 1932, United Cigar Stores Company of America, the debtor herein, filed a voluntary petition in bankruptcy and was duly adjudicated a bankrupt. The nine petitioners herein* were at that time landlords of United Cigar Stores under nine separate leases of real property, all of which were then in effect.

To enable it to deal expeditiously with some one thousand leases of real estate (R. 262), the trustee-in-bankruptcy sent circular letters to the landlords suggesting that agreements (varying slightly, to meet different situations) be entered into between the trus-

* Abe Schwartz and Myrtle Schwartz (R. 58-79); William E. Munk *et al.* (R. 80-100); Simon Lorch (R. 100-169); Louise S. Whitcomb *et al.* (R. 232-243); Fred O. Excell *et al.* (R. 244-255); J. E. Nunn (R. 169-182); Herbert Livingston *et al.* (R. 182-192); Thos. H. Brown *et al.* (R. 193-221); J. A. Rubel *et al.* (R. 222-231).

tee-in-bankruptcy, the bankrupt and the landlords (Trustee's Exhibit C, D and E (R. 9-16)). The trustee, in its letters pointed out that its rejection did not clear the landlord's title to his property, because the bankrupt's interest in both the lease and subleases remained. Attention was also called to the fact that questions remained concerning the rights of landlords to subleases made by the bankrupt, and to subrents collected since the bankruptcy, and concerning use and occupation claims against the trustee, all of which it was proposed should be taken care of by the proposed agreement.

To carry out the suggestions contained in the letters, the bankruptcy trustee prepared six printed forms of agreements to fit the various landlord situations (Claimant's Exhibits 1-6; R. 26-57).

The agreements were briefly described in the majority opinion below (83 Fed. (2d) 204). The only ones involved here are the so-called blue and white forms used in combination to cover one situation, and the green form. The blue and green forms were substantially identical.

As described in the opinion below (83 Fed. (2d) 204), the blue and white forms "were for use together in cases where the bankrupt both occupied part and sublet part and the trustee wished to continue the store." The white "form contained a use and occupancy agreement." The blue form "provided for the assignment by the trustee and the bankrupt of all their interest in the main lease except as it covered the store the bankrupt had used and in the subleases and in all of the rents accrued and to accrue under the subleases; the lessor assumed all the obligations of the trustee and the bankrupt under the lease and subleases, agreed to hold them harmless from any liability thereunder, and gave them and the bankrupt

estate a release similar to those already mentioned except as to that portion of the premises used as a store by the trustee and covered by the above-noted use and occupancy agreement."

The green form "was for use where the bankrupt had leased premises on which it had operated no store but had sublet the property. That provided for the assignment by the trustee and the bankrupt to the lessor of all their interest in the lease and subleases and to rents accrued and to accrue under the subleases, for a release to them and the bankrupt estate from the lessor similar to those already mentioned, and for the assumption by the lessor of all their obligations under the lease and the subleases."

Annexed to each agreement was a schedule of the subleases assigned.

The nine petitioners here refused to sign the agreements in the printed form presented by the trustee, although numerous other landlords did sign them. Accordingly a form of rider was proposed by the trustee. These riders, in the form in which they were finally included in seven of the agreements herein, provided:[a]

THE TYPICAL QUALIFICATION.

> "Nothing in this Article 5 shall be deemed a waiver by the Landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or to relieve the Landlord from

[a] Excell (R. 252), Munk (R. 86), Lorch, (R. 152), Whitcomb (R. 238), Schwartz (R. 76), Brown (R. 215), Nunn (R. 179).

the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance."

In two of the agreements the form of rider was different.

THE RUBEL QUALIFICATION (R. 228).

"It is understood and agreed, however, that nothing in Article 5 of this agreement, or in any other portion of this agreement, shall be deemed a waiver by the landlord to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled."

THE LIVINGSTON QUALIFICATION (R. 189).

"It is, however, expressly understood and agreed that the said Landlord does not waive any right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. All such provable claims shall not be affected by this agreement."

In the course of negotiation of these qualification riders, in one case the meaning of the typical form was the subject of discussion between the attorney and field representative of the trustee and the attorney for the claimant. The latter insisted that he wanted to "reserve the right to file any claim which might arise depending on future circumstances." Thereupon the typical form of rider was agreed upon.[b]

[b] Lorch (R. 307).

With the respective typewritten riders attached, all nine of the landlord petitioners signed agreements with the trustee between October 19, 1932 and December 3, 1932.[c] In five cases[d] the trustee sent notices of rejection to the landlords before the agreements were made. By January 1, 1933 the trustee had in all cases surrendered the respective premises and the landlords had reentered.[e] In the claim of Brown (R. 212 *et seq.*) the assignment of leases and subleases was made to a nominee. In the other eight cases, the assignments were made to the landlords but in the Lorch case there was express proviso made by an additional rider, that the assignment agreements would not "operate as a merger of said leases with the interest of the landlord as a fee owner of said premises" (R. 153).

On June 9, 1934, immediately after the effective date of Section 77B, while the bankruptcy proceeding of the debtor was still pending, the debtor filed its petition under Section 77B in such bankruptcy proceeding, as permitted by the statute.

The petitioners in due course filed proofs of claim

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[c] Excell, November 29, 1932 (R. 248); Munk, November 29, 1932 (R. 83); Lorch, October 19, 1932 (R. 149); Whitcomb, December 3, 1932 (R. 235); Schwartz, November 14, 1932 (R. 73); Rubel, October 22, 1932 (R. 225); Brown, November 28, 1932 (R. 212); Livingston, November 30, 1932 (R. 186); Nunn, November 22, 1932 (R. 176).

[d] Excell, November 25, 1932 (R. 249); Munk, November 21, 1932 (R. 84); Whitcomb, November 21, 1932 (R. 236); Brown, November 3, 1932 (R. 193); Livingston, December 3, 1932 (R. 182).

[e] Excell, surrender December 31, 1932, re-entry January 1, 1933 (R. 244); Munk, surrender November 18, 1932, re-entry December 1, 1932 (R. 80); Whitcomb, surrender August 31, 1932, re-entry September 1, 1932 (R. 232); Brown, surrender November 10, 1932 (R. 193); Livingston, surrender December 3, 1932, re-entry December 3, 1932 (R. 182); Lorch, surrender August 31, 1932, re-entry August 31, 1932 (R. 100); Schwartz, surrender August 31, 1932, re-entry September 1, 1932 (R. 59); Rubel, surrender August 31, 1932, re-entry August 31, 1932 (R. 222); Nunn, surrender September 1, 1932 (R. 170).

for injury resulting from the rejection of their leases. Irving Trust Company, which had been continued in the 77B proceedings as trustee objected to the claims on the ground that they were barred by the assignment agreements.

RULINGS OF THE COURTS BELOW.

The Special Master recommended that the claims be disallowed (R. 324 *et seq.*), on the ground that the agreements cut off petitioners' rights to claims. He conceded that claims for future rent were intended to be preserved in the qualification riders but held that they were limited to provability resulting from a ruling by this Court that such claims were provable but did not include them if they should be made provable by legislative enactment (R. 330, 332). The Master's report was confirmed by the District Court without opinion (R. 337).

The Circuit Court of Appeals, by a divided court, sustained the conclusion of the Special Master on different grounds. The majority held that the agreements constituted surrenders, terminating all lease rights, and, in effect, that no landlord claim was provable in 77B unless it was a continuing claim against the debtor recognized by "the substantive law of landlord and tenant", *i. e.*, the applicable State law. The riders were held to be qualifications of the release clauses only. Since, under the Court's interpretation there were no rights surviving the agreements to be caught by the releases, the riders were of no effect. Judge Hand, dissenting, likewise held that the agreements operated as surrenders but disagreed with the opinion of his brothers that the qualifications "did not 'limit in any way the effect of the agreements for lease modifications'." In his opinion the qualifications showed the intention to reserve

future rent claims. He also disagreed with the Special Master's conclusion that they preserved claims made provable by judicial decision but not by legislative sanction.

On petition for rehearing (R. 380 *et seq.*,), it was pointed out to the majority of the Court of Appeals (1) that in two of the claims, Rubel and Livingston, the riders (quoted *supra*) were by their express terms not limited to the release clause but went to the whole agreements; (2) that in one case (claim of Lorch) there was express provision against merger; (3) that in one case (claim of Brown), assignment of leases had been made to a third party which prevented merger and hence surrender. The majority agreed that the Rubel and Livingston riders took them out of the scope of their prior ruling but held, with the Special Master, that the qualification riders were limited to provability of future rent claims brought about by judicial decision and did not include provability by legislative enactment. The majority therefore adhered to its prior disposition of these claims.

QUESTIONS PRESENTED.

(1) Were the petitioners persons "injured by * * * rejection" of their leases "in a proceeding pending prior to the institution of" this 77B proceeding and have they claims "for injury resulting from the rejection," within the meaning of Section 77B of the Bankruptcy Act and are the petitioners' claims, accordingly, provable herein, irrespective of whether or not there was a surrender after rejection.

(2) Do the typewritten qualification riders attached to the agreements, reserve claims with respect to future rent, provable in these 77B proceedings, irrespective of whether or not those agreements oper-

ated as surrenders and irrespective of the language of release contained in those agreements.

STATUTES INVOLVED.

The relevant parts of statutes having an important bearing on the case are set out in Appendix B annexed to this brief.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In holding that petitioners' claims were properly disallowed because the debtor's liability had been terminated by surrender before the initiation of the 77B proceedings herein.

(2) In holding that the riders, attached to the agreements entered into between petitioners, the bankrupt-debtor and the trustee-in-bankruptcy in the prior bankruptcy proceeding, did not reserve claims with respect to rent, provable in the subsequent 77B proceeding.

(3) In failing to hold that Section 77B conferred a new kind of claim in bankruptcy upon rejection of a lease in a prior bankruptcy proceeding, which is provable in a subsequent 77B proceeding despite intervening surrender.

(4) In failing to reverse the District Court.

SUMMARY OF ARGUMENT.

The petitioners' claims are allowable, whether or not under the applicable State law the lease was terminated by surrender under agreements in the prior

bankruptcy proceeding, in which the present 77B proceedings were taken. The language and purposes of Section 77B make it clear that Congress intended to grant claims to all landlords whose leases were rejected, irrespective of whether or not the lease term was surrendered after rejection, or whether or not lease liability survived under covenants of the lease, or whether or not that rejection occurred in the 77B proceeding or during the pendency of a prior bankruptcy. Section 77B creates a new kind of claim in bankruptcy, dependent on rejection and different from those dependent on the State law of landlord and tenant, based on continuing liability.

In any event, agreements between petitioners, the bankrupt-debtor and the trustee-in-bankruptcy contain riders which reserved out from the agreements, petitioners' rights to provable claims. The language of those riders applies equally to claims under 77B, as to claims under the Bankruptcy Act as it existed before the passage of 77B. Those reserved rights, included claims with respect to future rent and are not limited to future rent claims held provable by judicial decision under pre-existing law, but include such claims made provable by subsequent legislation, to wit, Section 77B.

POINT I.

Under Section 77B, future lease liabilities are terminated through rejection and landlords are given as compensation therefor a claim against the debtor's estate, independent of the effect of the termination under the substantive law of landlord and tenant.

The Circuit Court of Appeals held that the assignment agreements between the landlords-petitioners herein, the tenant-bankrupt, and the trustee-in-

bankruptcy, entered into during the pendency of the original bankruptcy proceedings and after the rejection of the leases by such trustee, constituted surrenders which "ended the liability of the lessee for future rent under the leases". The majority of the Court (Judge A. N. Hand dissenting), held that consequently your petitioners, even though their agreements were qualified, had no claims in this 77B proing, which was "taken in" the bankruptcy proceeding.[1]

The Court did not recognize that under Section 77B, the claim of a landlord depends simply upon the rejection of a subsisting lease, whether such rejection occurred in a 77B proceeding *or* in a prior bankruptcy proceeding. Here the leases were in full force and effect at the time of the rejection. The assignment agreements were not executed until an appreciably later date.

The *ratio decidendi* below was that since the leases were terminated by said agreements before these proceedings were instituted or Section 77B passed, and the leased real estate was surrendered to and accepted by the landlords "without any reservation", *no* future rent claims survived to be either barred or saved by the qualified release provisions of the agreements, which were thus totally ineffectual as to the claims here involved.[2] The Court said:

"The issue here is not one of the provability of

[1] A trustee in bankruptcy does not in fact "reject", but merely fails to adopt a lease (*In re Frazin*, 183 Fed. 28, 32). Although there was a formal notice of disaffirmance in five claims herein before the assignment agreements were entered into (R. 321), the failure of the trustee to adopt any of the leases constituted a rejection in fact and law in all nine cases.

[2] Upon petition for rehearing the Court placed its decision in two of the cases upon different grounds which are discussed in Point II of this brief.

actual claims for future rent, but rather one of recognition that the claimants have no claims at all against the debtor or its estate" (83 Fed. (2d) 202, 206).

The error of the majority of the Court was its failure to realize that Section 77B gave to landlords of debtors in 77B proceedings a claim not previously recognized in bankruptcy, *different from* a "claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (83 Fed. (2d) 202, 206). The effect of the section is that the tenant's continuing liability, whether (1) for rent under an unexpired lease of real estate or (2) for damages or indemnity under a covenant contained in such lease, may be terminated in 77B proceedings (subdiv. (b)(6), (c)(5)), and that the landlord shall have *in lieu thereof,* "a claim ranking on a parity with debts which would be provable under Section 63(a)" of the Act (subdiv. (b)(10)).

The decision of the majority of the Court is based on the assumption that lease obligation had to exist at the time "these proceedings were instituted" (83 Fed. (2d) 202, 206). But 77B expressly provides to the contrary. It gives a claim not only where "* * * an * * * unexpired lease of real estate shall be rejected * * * in a proceeding instituted under this section" but also where such a lease "*shall have been rejected by a trustee or receiver in bankruptcy* * * * *in a proceeding pending prior to the institution of a proceeding under this section* * * *" (subdiv. (b)(10)). All that is necessary for a landlord's claim is *the existence of a continuing lease liability at the time of rejection,* whether the rejection occurred in a 77B proceeding or "*in a proceeding pending prior*

to the institution of a proceeding" under Section 77B.[2a]

The claims now asserted by your petitioners arose out of rejection in the prior proceedings and are, accordingly, squarely within the terms of the statute.

THE EFFECT OF SECTION 77B IS TO PERMIT TERMINATION OF BURDENSOME LEASES AND TO GIVE LANDLORDS PROVABLE CLAIMS IN BANKRUPTCY, WHETHER OR NOT UNDER APPLICABLE STATE LAW THEY WOULD HAVE PRESENTLY ASCERTAINABLE CLAIMS.

Prior to the enactment of Section 77B, a corporate tenant desiring to reorganize, could not rid itself of lease-liabilities in bankruptcy. Rejection of the lease was merely the bankruptcy-trustee's refusal to assume, on behalf of the bankrupt estate, a burdensome asset. (*In re Frazin, supra.* See *Dushane* v. *Beall*, 161 U. S. 513 at 515-516.) Such rejection did not affect the bankrupt-tenants' obligations for future rent or for damages or indemnity, as the case might be, which continued as before.

Section 77B aimed at reorganization rather than liquidation and hence it was necessary to empower the trustee to terminate continuing lease-liabilities of the debtor-tenant. "Rejection" under 77B, therefore, is no longer a mere disclaimer but a means of effective termination of the obligations of the debtor-tenant, paving the way for reorganization.

[2a] The foregoing is reinforced by the provisions of Section 77B(p) which reads:

> "*This section* shall take effect and be in force from and after the date of the approval of this amendatory Act and *shall apply* as fully *to debtors,* their stockholders *and creditors, whose interests or debts have been acquired* or incurred *prior to such date,* as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act."

As a necessary corollary, landlords had to be compensated for termination of such obligations. Termination without compensation would violate due process. Further, permitting stockholders to participate in reorganizations without compensation for creditors would have violated the principle of the *Boyd* case.[3] In addition, Section 77B had to cover, not only leases containing covenants in a form under which the applicable landlord and tenant law recognized presently ascertainable damages or indemnity, but also leases which contained no covenants, or in which the covenant was in such form that such applicable law recognized no damages until an ~~impossibility~~ remote period.[4] In consequence Section 77B, besides recognizing presently measurable claims if they exist, created a new kind of bankruptcy claim, discussed in more detail, *infra,* to cover situations in which applicable landlord and tenant law recognized no corresponding claim.

SECTION 77B ACCORDS A LANDLORD WHOSE UNEXPIRED LEASE WAS REJECTED IN THE PRIOR BANKRUPTCY PROCEEDING IDENTICAL TREATMENT WITH A LANDLORD WHOSE LEASE WAS REJECTED IN 77B.

Congress was well aware that chain store and other corporations were endeavoring in large numbers to rid themselves of lease burdens under the bankruptcy law as it existed before the passage of Section 77B. That pre-existing law afforded no relief to the hapless

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[3] *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482.

[4] In the companion case of *In re United Cigar Stores Company of America* (Kuehner-Fischer, Appellants), 85 Fed. (2d) 35 submitted herewith, the same Court which passed upon this case applied the statute in a manner contrary to its application here. It held provable the claim of a landlord under a rejected lease containing a covenant of indemnity in such form that under the State Law damages could not have been liquidated until the end of the term. (*Hermitage* v. *Levine*, 248 N. Y. 333.)

landlords of corporations.[5] The reason for the retrospective provision and its intent are therefore evident. Indeed, the provision for landlords' claims "in case * * * an unexpired lease shall have been rejected * * * in a proceeding pending prior" to a 77B proceeding, must have been particularly intended to apply to landlords of corporations in bankruptcy at the time 77B was passed. After 77B became law, proceedings

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[5] Congressman Celler, 76 Cong. Rec. part 2, page 1360, stated:

> "Mr. Celler: Mr. Speaker, I have introduced a bill to amend the Bankruptcy Act *to prevent the recurrence of such scandals as grew out of the United Cigar Stores bankruptcy.*
>
> "* * * Under the present law, * * * the rent survives the bankruptcy and accrues for the term of the lease subsequent to the bankruptcy * * * In the case of a corporation the landlord has an empty right because a reorganization is effected in the name of the new corporation. This procedure was followed in the case of the United Cigar Stores bankruptcy * * * An individual * * * cannot by such subterfuge disavow his obligation * * *
>
> "The Bankruptcy Law was never intended to allow these large corporations in this slick manner to get out of their leases. It is interesting to note in this connection that the Irving Trust Company of New York City * * * has been aiding and abetting most of these schemes. * * * In the United Cigar Stores bankruptcy, the Irving Trust Company countenanced this enforced cancellation in the case of 860 leases. * * *
>
> "Under the proposed amendment the unexpired terms of the leases would be capitalized and would be a provable debt against the estate and the discharge in bankruptcy would relieve both the corporation and the individual * * *"

Mr. McKeown stated (*United States Judicial Committee (House) Hearings;* 73 Cong. 1-2 ses. Mis. p. 193):

> "That attempts to bring in and provides for the approval and settlement of claims that otherwise would not be liquidated claims. For instance take one of these cigar store chains and it has a 99 year lease on some nice corner piece of property, and that lease is unexpired. The way they get out of that at present is they go into bankruptcy and discharge that lease, under this; the fellow has a chance to come in and get approval of the claim for an executory contract."

under Section 77B would ordinarily be taken without prior bankruptcy proceedings, not *in* them as here. The provision last quoted will, therefore, have very little application in the future; it was designed to remedy existing inequities.

Further indication of Congressional intent to give landlords remedies in then pending bankruptcies, appears from a comparison of the provisions of 77B with the corresponding provisions of Section 63(a), enacted contemporaneously, making landlords' claims under rejected leases provable. Section 63(a) with respect to landlord claims is specifically limited "to estates * * * in which the time for filing such claims has not expired" (63(a)(7)). Section 77B not only contains no such time limitation but specifically provides that such claims *may be proved* if the lease "shall have been rejected * * * in a proceeding pending prior to the institution" of the 77B proceeding.

The decision below is directly contrary to the expressed intent of Congress and has denied these retrospective provisions of 77B substantially the chief effect that they were intended to have.

THE DETAILED PROVISIONS OF SECTION 77B RESPECTING LANDLORDS' CLAIMS PLAINLY MAKE CLAIMS UNDER LEASES A NEW KIND OF BANKRUPTCY CLAIM.

Congress, in the exercise of its bankruptcy power, has created a new class of creditors, not recognized by the substantive law of landlord and tenant and not previously existing in bankruptcy. Section 77B provides at some length, that a person whose lease is rejected in a 77B proceeding, *or has been rejected by a trustee in a prior bankruptcy proceeding,* if injured by such rejection, shall for all purposes of the Act "be deemed to be a creditor" (Section 77B (b)(10)). Then follows the provision limit-

ing the amount of such claims and also the amount of landlord claims under covenants, *i. e.*, claims which have always been recognized under the substantive law of landlord and tenant. This provision reads:

> "The claim of a landlord (1) for injury resulting from rejection of an unexpired lease of real estate *or* (2) for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63(a) of this Act, but shall be limited" etc. (Numerals and italics ours.)

The decision of the Court below nullifies the foregoing provision for the allowance of claims "for injury resulting from rejection of an unexpired lease". It completely disregards the separate classification and alternative manner of describing different types of landlords' claims, as well as the elaborate (and retrospective) provision that "any person injured by" a "rejection shall * * * be deemed to be a creditor".

The "substantive law of landlord and tenant" confines its remedy for loss of future rents after termination, to leases containing appropriate covenants providing for damages or indemnity. Section 77B, being, like the rest of the Bankruptcy Act, a law unto itself, has provided for the allowance of another class of claims, *i. e.*, claims for injury—the pecuniary loss—resulting from the exercise of the right to reject unexpired leases. The provision for the allowance of claims "for damages or indemnity" presupposes a valid and existing claim under lease law. The provision for claims for injury resulting simply from rejection of the lease presupposes merely a financial

loss, thus setting up a strictly 77B claim.[6] But the Court below in this case has read this last group out of the statute.[7]

RE-ENTRY OR SURRENDER AFTER REJECTION DOES NOT BAR A LANDLORD'S CLAIM FOR FUTURE RENT.

Even if the agreements had constituted surrenders, as held below,[8] it by no means follows that these landlords' claims were thereby lost or affected.

After providing for the two classes of landlords' future rent claims, 77B provides that they

> "* * * shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years *next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever*

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[6] Under the English Bankruptcy Acts (32 and 33 Vict., c. 71, Sec. 23 (1869); 46 and 47 Vict., c. 52, Sec. 55(7) (1883); 4 and 5 Geo. V, c. 59, Sec. 54(8) (1914)), the English Courts hold that a landlord is "injured" by a disclaimer (the equivalent of rejection under 77B) if financially damaged, regardless of whether or not there is a surviving covenant for damages or indemnity. Since the landlord provisions were included in Section 77B very shortly after the decision in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, which refers to the English act at length, it is apparent that the section was patterned on such act. The language of the two is almost identical and Congress must have intended that the same effect be given to the language in 77B as the English Courts gave the corresponding language in the English acts.

[7] *In re Paramount Publix Corp.* (*Madison-Toledo Co.* v. *Paramount Pictures, Inc.*), 85 Fed. (2d) 83, this same Court allowed a claim on a rejected lease which had no covenant for damages or indemnity. In that case, the lease had not been terminated prior to the enactment of the statute. But, as has been seen it is immaterial whether or not the lease has been rejected in a 77B proceeding "or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution" of a 77B proceeding.

[8] Petitioners deny that the agreements constituted surrenders (see footnote 10, *infra*).

> *first occurs,* whether before or after the filing of the petition, *plus unpaid rent accrued* up to such date of *surrender or reentry* * * *"

Landlords' claims under 77B, as previously pointed out, depend only upon a continuing lease liability of the tenant-debtor at the time the lease *is rejected.* In each of the nine claims herein, the leases had been rejected, either expressly or in effect, prior to the execution of the agreements. Since the claims are born of rejection, no subsequent surrender between landlord and tenant could be material.

Furthermore, how could surrender, if such there was, affect the provability of a landlord's future rent claim when the Act itself expressly fixes "the date of surrender" as a determinative factor in computing the *amount* of the claim? Surrender is *contemplated* in proving such amount. Being one of the elements of the measure, it quite obviously cannot be a bar to that which is to be measured. And the surrender referred to in the measure, is one which occurs either "before or after the filing of the petition" (77B (b) (10)).[9]

Surrender is a necessary part of the scheme of 77B. Landlords with rejected leases containing no surviving covenants, in order to maintain claims, would otherwise have to leave their premises idle until the claim was allowed, or conceivably until the 77B pro-

[9] The phrase in the statute is "surrender of the premises". This phrase has been defined in *Gray* v. *Kaufman Dairy & I. C. Co.*, 162 N. Y. 388 (cited by the majority opinion of the Circuit Court of Appeals, 83 Fed. (2d) at p. 205), as follows:

> "It is so well settled as to be almost axiomatic that a *surrender of premises* is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made."

ceeding was ultimately closed. If surrender or any similar ending of the term cut off the right to provable claims under the section, it would necessarily cut them off whenever it occurred whether the leases contained surviving covenants or not. Unless those leases were terminated by rejection, surrender or otherwise, landlords could not be given allowed claims, at any stage of the proceedings. It would necessarily remain uncertain until the end of the lease term, whether or not the continuing rights under lease or covenant, would not be prematurely ended by some act or omission of the landlord and hence, the right to a provable claim lost. No such suspense of status is contemplated by 77B, since it grants landlords claims "for all purposes of this section and of the reorganization plan, its *acceptance* and *confirmation* * * *" Those claims must, therefore, be allowed and votable before reorganization. It follows that the statute contemplates not continuing liability but termination.

If further proof of Congressional intent is needed on the point that 77B claims are based on termination and not continuation of lease liability, it is furnished by the provisions of the Bill relative thereto, as it originally passed the House, in contrast to the provisions finally enacted. The House Bill read (H. R. 5884-73rd Cong. 1st Sess., Print of June 2, 1933, p. 10):

> "In case any executory contract *shall be* rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach and such claim may be allowed *provided such contract shall not have been terminated by forfeiture, reentry, or otherwise.*"

The elimination of the concluding clause and the substitution of the present provision speak for themselves.

In sum, petitioners here are asserting exactly the claims which Congress provided they should have under Section 77B. Congress defined the claims which it proposed to make allowable. In providing for these claims, rejection and surrender were obviously contemplated. If the trustee was not empowered to terminate the lease with or without the consent of the landlord, the latter might indefinitely delay the reorganization of the debtor by refusing to either re-enter or accept surrender, thus keeping the lease in force, despite rejection. That power to terminate granted, the landlord is naturally and necessarily given a compensatory claim. And a landlord "injured" by rejection in a prior bankruptcy or equity receivership, whether before or after the passage of Section 77B, is expressly accorded exactly the same standing as one who loses his tenant by rejection through the new means of corporate reorganization set up by the legislation.

POINT II.

The qualification riders attached to the assignment agreements reserved the petitioners' claims herein, even if those agreements be construed as surrenders.

Assuming that the agreements did constitute surrenders,[10] petitioners' claims were nevertheless preserved by virtue of the typewritten riders annexed thereto. The proposition that rights may be saved from the operation of surrenders by agreement, has not been disputed. Obviously, the only possible reason for the riders herein was to preserve rights. The majority of the Circuit Court of Appeals apparently conceived of the assignment agreements as two dis-

[10] One of the chief advantages held out by the trustee to induce landlords herein to enter into the assignment agreements with the bankrupt and the trustee-in-bankruptcy was the preservation for the landlords of subleases entered into by the bankrupt (R. 9-16). If, as the majority of the Circuit Court of Appeals held, these agreements constituted surrenders, the estates of the tenant and landlord merged and the subleases were wiped out. Whether or not an agreement operates as a surrender is a matter of intention. Since an important purpose of the agreements was to preserve the subleases, which would be destroyed by surrender, the agreements cannot be construed as agreements of surrender. Almost the exact point here involved has been passed upon in a decision post-dating the decision below. The New York Court of Appeals in *Metropolitan Life Ins. Co.* v. *Hellinger*, 272 N. Y. 24, held that where an agreement intends to preserve subleases it will not be interpreted as contemplating a merger, *i. e.*, a surrender.

> "Per Curiam. We do not reach the question of what defendant's obligations, if any, would have been had there been a mere technical surrender of the master lease and nothing more. The terms of the agreement of September 13, 1930, clearly and as matter of law disclose an intent that the subleases were to be kept alive and that the owner should stand in the shoes of the defendant's immediate lessor. In effect there was an assignment of the subleases. Any narrower interpretation would be inequitable. Under such circumstances the doctrine of merger is inapplicable. (*Beal* v. *Boston Car Spring Co.*, 125 Mass. 157; *Appleton* v. *Ames*, 150 Mass. 34; *cf.* 13 Columbia Law Rev. 245.)"

tinct instruments, one constituting a surrender, the other a release. Since they held the agreements operated as surrenders, they further held no claims with respect to future rent survived to be barred by the releases or to be preserved by the modifying provisions of the riders. By this reasoning, since surrender is a matter of intention, there is attributed to petitioners the simultaneously inconsistent purposes of surrendering all their rights and then, by the riders, of preserving the rights which they had just given up.

Insofar as there is a conflict between the rider and the other parts of the agreement, the rider must prevail. The typewritten material takes precedence over the printed form. There is a presumption against surrender of rights. The writings must be construed against the writer, which in this case was the trustee.

Judge A. N. Hand, who held with his brothers that the agreements constituted surrenders, nevertheless recognized that the document was a single agreement and refused to subscribe to the statement of the majority that the riders "did not 'limit in any way the effect of the agreements for lease modifications' ". He said (83 Fed. (2d) 202, 207):

> "It is said in the opinion that the leased real estate was 'surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee. * * *' But that, I think, is not at all what was done. Not only did the statement in the rider that there was no 'waiver by the Landlord of the right to prove against the bankrupt estate any provable claim' limit the general release, but the rider cannot have the meaning intended unless it be taken to reserve against the bankrupt's estate any claims which existed but for the surrender and general release."

Certain it is that the riders were intended to reserve some thing.[11] The only question is whether the reservations they made were sufficiently broad to include the future rent claims presented in this 77B proceeding.

That the reservations are sufficiently broad to include 77B claims is apparent from the language of the riders. The typical form of rider reserves the right (numerals in parentheses ours):

> "To prove (1) against the Bankrupt Estate (2) any provable claims (3) to which the Bankruptcy Court may adjudge the landlord is entitled."

In respect to all three characteristics, the 77B claims filed by the nine petitioners herein, come squarely within the language used.

1. The "Bankrupt Estate" is simply that property which formerly belonged to the bankrupt and came into the custody of the Bankruptcy Court where it remains.

2. Section 77B(b)(10) expressly makes claims for future rent "provable claims".

3. A 77B Court is a "Bankruptcy Court" by express provision of 77A. Here the identical Bankruptcy Court sat in the 77B and the prior bankruptcy proceedings.

Thus these future rent claims in this proceeding under the Bankruptcy Act fit perfectly the rider's description of the claims reserved.

1. The claims for future rent filed in this proceeding are claims against "the Bankrupt Estate".

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[11] In the briefs below it was said that the claims were not "reserved" as the riders in terms provide for the non-waiver of the claims. This, on its face, is a distinction without a difference. What one does not waive, one retains or reserves.

"The bankrupt estate" has been judicially defined to mean "the unencumbered assets generally of a bankrupt, properly administerable in bankruptcy, as distinguished from property of the bankrupt dedicated by law to the payment of a particular obligation or upon which there is a subsequent lien". *In re Menzies,* 60 Fed. (2d) 1064, 1067; *In re Rauch,* 226 Fed. 982, 984, affd. *sub nom Lott* v. *Salsbury,* 237 Fed. 191.

The 77B definition of "creditors" includes "all holders of claims of whatever character against the debtor *or its property* * * *" The claims filed in the 77B proceedings by the petitioners are claims against the erstwhile "Bankrupt Estate". At the date of the agreements, this body of assets had already vested in the bankruptcy trustee. Thereafter, upon approval of the 77B petition herein, these assets, as an entity, went over intact to the 77B trustee. The *res* remained identical.[12] Section 77B(p) provides

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[12] How far this is so, may be seen from the order of the District Court dated June 14, 1934, whereby the newly appointed Trustee in the 77B proceeding was authorized to take immediate possession of the "business, assets and properties of the Debtor and of the Bankruptcy Trustee", the same "being herein collectively referred to as the Debtor's estate". As the Debtor had some years previously been divested of all of its property by the filing of the bankruptcy petition, all that passed under the order were the assets held by the Trustee in bankruptcy, *i. e.,* the "Bankrupt Estate". The identity of the bankrupt's and the Debtor's estate was so complete that the said order went on to provide:

> "* * * the Trustee being authorized to continue the books of account of the Bankruptcy Trustee without division, all operations beginning with the opening of business on the date of this order being deemed to be for the account of the Trustee."

By further provisions of said order, the Trustee in 77B by its mere qualification as such, was deemed to have assumed all obligations of the Bankruptcy Trustee and automatically to have succeeded to all authority vested in the Bankruptcy Trustee by prior orders.

that 77B proceedings "may be taken in (pending) proceedings in bankruptcy". That is just what was done by United Cigar Stores Company of America. The assets are, therefore, still in the original bankruptcy proceeding in which the claims were reserved.

2. The proposition that claims for future rent are "provable claims" in bankruptcy proceedings under Section 77B will scarcely be disputed. See Section 77B(b). That petitioners here at the time the agreements were made had claims of the kind made provable by Section 77B has already been demonstrated in Point I, *supra*.

3. The "Bankruptcy Court" at the time of the assignment agreements was the United States District Court for the Southern District of New York. These 77B proceedings are pending in the same Court, which, in such 77B proceedings, sits as a Bankruptcy Court, expressly so constituted by the Bankruptcy Act, Section 77A, which provides:

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, *courts of bankruptcy* shall exercise original jurisdiction in proceedings for the relief of debtors as provided in Section 77B of this Act."

77B proceedings are "proceedings in bankruptcy". (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 165.)[13]

This proceeding was necessarily instituted under Section 77B(p) and was therefore "taken in (the

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[13] To the same effect *In re Commonwealth Bond Corporation*, 77 Fed. (2d) 308 at 309; *In re Island Park Associates*, 77 Fed. (2d) 334 at 334; in which the Circuit Court of Appeals, below, refers to a "debtor" filing "its petition in bankruptcy under Section 77B".

then pending) proceedings in bankruptcy". We are therefore still in the original bankruptcy proceeding in which these claims were expressly and admittedly reserved. *Vitagraph, Inc.* v. *St. Louis Properties Corp.*, 77 Fed. (2d) 590, 592-593. As was said by Judge Mack in *In re Associated Gas & Electric Co.*, 11 Fed. Supp. 359 at 364, after referring to part of one of the House Reports on Section 77B. "The indication here, too, is that *section 77B is but an added step in bankruptcy rather than an organically new legal proceeding.*"

Though reorganization, instead of liquidation, may be the objective and result of the present form of this proceeding, the *forum* and the *proceeding itself* has been the same throughout, as much so as would have been the case if, before the enactment of Section 77B, the bankrupt, under the old statute, had proposed a composition instead of permitting the assets to go to liquidation. (See *Campbell* v. *Alleghany Corp.*, 75 Fed. (2d) 947 at 953.)

Thus the claims for rent made by the petitioners in the 77B proceedings are "provable claims" made against the very assets against which they were reserved, *i. e.*, the "Bankrupt Estate", in the same Bankruptcy Court, all as provided in the reservation rider.

Not only are the riders apt in phraseology to include 77B claims for rent, but it seems no longer open to doubt that the parties had future rent claims in mind when drafting and adopting the reservation riders. The Special Master so held (R. 330, 332) and so did the majority of the Circuit Court of Appeals (R. 396). As Judge Hand points out in his dissent, the trustee and the debenture bondholders conceded

the same thing in their briefs below[14] (83 Fed. (2d) 202, 207).

Although all agree that the reservation riders included future rent claims, they say that the rider contemplated that future rent claims were only intended to be provable, if they were held to be so by future judicial decision and not if they were made provable by future legislation.

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[14] That future rent claims were contemplated is established by the printed instructions of the trustee to its field agents and the rider which was used in the Claim of Morgan, one of the companion claims argued together with these claims below. (See record on certiorari, p. 394.) The printed instructions advised the trustee's field agents that the riders might be inserted where requested. The last sentence with respect to the rider reads (R. 19):

> "You should note that this additional paragraph provides that claims for rent under the lease or damages in respect thereof are not deemed provable claims."

In the Morgan claim the rider reads in the typical form but has added thereto the sentence:

> "In no event shall provable claims be deemed to include any claims for rent under the lease or for damages in respect thereof."

In other words, it is quite clear that the rider as drafted by the trustee was in the typical form herein set out *plus* the last sentence of the Morgan rider above quoted. *It was stricken out of the riders in the case of the petitioners* thus emphasizing their intent (recognized even by the Circuit Court of Appeals) that future rent claims be reserved by the riders.

So again ~~In fact,~~ where the trustee intended to exclude future rent claims from the general provisions of the rider, it so stated in unmistakable terms. See claim No. 5241, Detroit Trust Co. etc. record on certiorari, page 432. The qualifications there provided:

> "But nothing in this agreement contained shall be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate any provable claims for rent or taxes accruing prior to August 29, 1932 * * *."

The majority of the Circuit Court of Appeals said, in denying rehearing[15] (R. 396):

> "The parties were contracting in view of the then existing uncertainty as to the provability in bankruptcy of claims for future rent which was not dispelled until some two years later by the decision in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, 54 S. Ct. 385, 78 L. Ed. 824."

In other words, the majority of the Court says that landlords, knowingly and deliberately contracting with respect to rent claims and aware of the then existing uncertainties surrounding such claims, intended to have such claims only at the hands of the Court and did not want them at the hands of the legislature! In fact, at the time the agreements were signed (between October 19, 1932 and December 3, 1932) the *Manhattan Properties* case was an obscure litigation unknown to the public on which the Circuit Court of Appeals did not speak until months afterwards, and the always remote possibility that this Court would grant *certiorari* was not even a topic for speculation. *In re Roth & Appel*, 181 Fed. 667, had been law for twenty-two years and there was no reason to suppose that its holding would be judicially changed. On the other hand, as demonstrated in Appendix A to this brief, Congress was, at the time of the signing of the agreements, and had been for long theretofore, actively engaged in widely publicized

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[15] On petition for rehearing, it was pointed out that in the Rubel and Livingston claims (R. 383-386), the riders were not merely limitations of the releases but by their express terms went to the whole agreement and therefore were not ruled by the reasoning of the majority opinion with respect to surrenders. The majority agreed that this was so but still barred the claims on the ground that the riders did not include 77B claims for rent if made provable by future legislation as distinct from future judicial decision.

consideration of amendments of the Bankruptcy Act which, it was generally believed, would include relief for landlord creditors. It is far more probable that when the reservations were made, the hope was for legislative, rather than judicial relief. As Judge Hand said in his dissent (83 Fed. (2d) at 207):

> "But remedial legislation as to such claims was already before Congress when the agreements were made, and the riders nowhere limited claims which might be proved to those that the law then allowed. The rider specified 'any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled'. This, I think, embraces any claims which might then be provable or which might become provable through subsequent legislation * * * *I can see no distinction between a provability arising from legislative sanction and provability arising from judicial decision.*"

There is not a word in the Record herein to indicate that the claims for future rent reserved by the riders were intended to be limited to provability arising through judicial, rather than legislative decision.

The only testimony on the subject is to the direct contrary. The meaning of the language of the typical rider was discussed between the parties, in one of the claims herein. Max Petacque, Esq., the attorney for Simon Lorch, who negotiated the assignment agreement with the trustee's representative and the trustee's counsel, on behalf of that claimant, testified as follows (R. 307):

> "Mr. Faust and Mr. Wolff, working rather closely together, I could not possibly identify which said which, but between the two of them, one or the other said that the landlords, after

all, did not have any claims against the estate and the only claim he could possibly have was a claim for taxes and they were willing to protect us on the taxes but we ought to waive any other sort of a claim inasmuch as I, as a lawyer, they said, knew that the landlords could have no other claims. I said to them that early in my practice of the law I made a number of mistakes by trying to guess all the answers to a situation and I was not going to try to guess all the answers to this situation, a situation so highly involved, knowing there were all sorts of allegations of fraud in connection with the filing of this proceeding, I did not know what was going to happen, whether the company was going to go through with it or whether the company was going to reorganize and *I wanted to reserve the right to file any claims which might arise depending upon future circumstances. We had a very considerable discussion over this matter and we finally agreed upon the clause such as appears in the instrument.*"

The Mr. Faust referred to in the above quotation was Chicago counsel to the trustee in these landlord negotiations. Mr. Wolff was the trustee's representative in Chicago in negotiating the agreement in question. The only answer made below by respondents to this very explicit testimony consisted of slighting remarks in their briefs, casting doubt on Mr. Petacque's veracity. However, neither Mr. Faust nor Mr. Wolff was called to the witness stand to challenge or contradict Mr. Petacque's testimony at the time it was given, though both were available and Mr. Wolff testified on other matters.

All that the Circuit Court of Appeals offers in support of its view (R. 396-7) is the unsupported statement that had rights under future legislation

been intended to be reserved, that intent should have been expressly set forth in the rider. Since the writing was the trustee's, it would be more to the point to say that, had it been intended to exclude future legislation, that exception should have been incorporated. In view of the unfortunate narrowing of generalities resulting from specification, the landlords were probably well advised to rest on the sweeping language which was used. Further, since the trustee was apparently admitting that the broad terms of the rider were intended to mean what they said (*vide*, Petaeque, *supra*), there was no occasion for specification.

Much was said in briefs below concerning the effect of the balance of the typical rider, which provides, after the language hereinabove quoted

> "* * * but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the trustee from contesting such proof or allowance."

Obviously, the clause was one inserted to make certain that the existence of the rider would not, by the very fact of its insertion, be deemed a waiver of defenses, when claims were thereafter asserted. Each claim had to be proved on its own merits, not through an inadvertent admission by the trustee. This was all that was meant. That this is so, is demonstrated by the printed instructions sent by the trustee to its field agents, which, with reference to the riders, said:

> "The purpose of this additional paragraph is to give the landlord a right to prove against the bankrupt estate any provable claims, if he has

any, *but it does not, of course, relieve the landlord from the necessity of proving and obtaining the allowance of such claims or preclude the trustee from contesting such proof and allowance*" (R. 19).

It was also argued below that the word "*is*" in the phrase of the riders "which the Bankruptcy Court may adjudge the landlord *is* entitled" limits the riders to then provable claims. Obviously "is entitled" is assimilated to "may adjudge", which even the trustee, in its brief below, said connotes futurity.

The interpretation of the riders given by the Circuit Court of Appeals is without support from the record, flies in the face of the only testimony on the subject, violates all the usual canons of construction and contradicts the reasonable probabilities of what would have been in the minds of parties contracting in the then situation with a view to preserving future rent claims.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed, with instructions to allow the petitioners' claims in the amount of such loss as the petitioners have suffered by reason of rejection of their leases, subject to the limitations on the amount of claims set forth in Section 77B.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

MURRAY C. BERNAYS,
GILBERT, DIAMOND & BRANDEIS,
Of Counsel.

APPENDIX A.

Summary of Legislative History of Section 77B.

In July of 1930, the President of the United States announced that he had authorized the Attorney General to undertake an exhaustive investigation into the whole question of bankruptcy law and practice for the purpose of proposing to Congress essential reforms therein. In 1931, the Attorney General reported and recommended that Congress consider making certain amendments to the Bankruptcy Act including amendments for the reorganization of corporations in bankruptcy. 8 American Bankruptcy Review 81 (Oct., 1931).

In February, 1932, the President, in a message to Congress, recommended changes in the bankruptcy law based upon the report of the Attorney General, which he forwarded to Congress (8 American Bankruptcy Review 225) (Feb., 1932). Following closely on the President's recommendation and in March of 1932, there was introduced in Congress the Hastings bill (S. 3866, H. R. 9968), which included, among other things, a proposal to amend the Bankruptcy Act by adding to it, as Section 76, a provision for corporate reorganization. 8 American Bankruptcy Review 260, 301 (Mar. 1932).

In his final report as Attorney General of the United States, the then Attorney General in December of 1932 submitted to Congress a recommendation for the immediate consideration of pending bankruptcy legislation, with emphasis upon early enactment with at least a provision for corporate reorganization.

After a second emergency message to Congress, on the subject of bankruptcy reforms, in January, 1933, another bill was introduced, the McKeown bill (H. R.

14133), which sought to repeal Sections 12 and 13 of the Bankruptcy Law relating to compositions and substitute therefor a provision relating to corporate reorganizations. 9 American Bankruptcy Review 151 (Jan., 1933).

Speeches on the subject were made in Congress—see Footnote 5 *supra*.

A valuable summary of the legislative history of 77B is to be found in *Duparquet Co.* v. *Evans*, 297 U. S. at 218-221.

The proposed bankruptcy legislation was a matter of public knowledge and public discussion. Mr. Robert T. Swaine (of the firm of attorneys representing the Trustee), in an article in the Virginia Law Review for February, 1933 pointed out that there had been at that time introduced in the Senate one bill and in the House two bills to provide for corporate reorganization under the Federal bankruptcy power (19 Va. Law Review 317, 328). See also other discussion in the same issue of the Virginia Law Review, 19 Va. Law Review, pages 333, 340, 343, and Editor's Note on the Reorganization Statute, page 382. See also Note in 42 Yale L. J. 387 (Jan., 1933).

In the face of this record there is no reason to assume, as did the Court below, that none of the landlords or their attorneys knew of the pending legislation or that it was not in their minds when the reservation riders were demanded and adopted. In view of the obscurity of the *Manhattan Properties* case at the time, the only reasonable assumption is the exact opposite from that of the Circuit Court of Appeals. Many of the landlords and their attorneys must have known of the pending legislation.

APPENDIX B.

Statutes Involved.

The pertinent provisions of the Corporate Reorganizations Act, which was added to the Bankruptcy Act as Sections 77A and 77B thereof by the Act of June 7, 1934, 48 Stat. 911, are:

> "Sec. 77A. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act."

Subdivision (a):

> "Any corporation which could become a bankrupt under Section 4 of this Act, * * * may file an original petition * * * in any proceeding pending in bankruptcy, whether filed before or after this section becomes effective. * * *."

Subdivision (b) (6):

> "A plan of reorganization within the meaning of this section * * * (6) may reject contracts of the debtor which are executory in whole or in part, including unexpired leases except contracts in the public authority; * * *"

Subdivision (b) (10):

> "* * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other

than stock, liens, or other interest of whatever character. * * *

"In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63(a) of this act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *"

Subdivision (c) (5):

"Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, * * * (5) may direct the rejection of contracts of the debtor executory in whole or in part; * * *."

Subdivision (p):

"This section shall take effect and be in force from and after the date of the approval of this

amendatory Act and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act."

Section 63 (a) of the Bankruptcy Act as amended reads:

"Debts of the bankrupt may be proved and allowed against his estate which are * * * (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act, in which the time for filing such claims has not expired."

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936

No. 436

IN THE MATTER
of
UNITED CIGAR STORES COMPANY OF AMERICA
Debtor

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*
Petitioners

IRVING TRUST COMPANY, as Trustee, UNITED CIGAR STORES COMPANY OF AMERICA, LANDLORDS' PROTECTIVE COMMITTEE, PREFERRED STOCKHOLDERS' PROTECTIVE COMMITTEE, DEBENTURE HOLDERS' PROTECTIVE COMMITTEE, JACOB RUPPERT REALTY CORPORATION and UNITED STORES CORPORATION
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

SUSAN BRANDEIS
Counsel for Petitioners

MURRAY C. BERNAYS
GILBERT, DIAMOND & BRANDEIS
Of Counsel

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

Statement

The brief for the Trustee, respondent, in its final form as filed herein, was not served upon us until the very day

that counsel left for Washington to argue this cause; and, indeed, the brief was delivered to counsel only at the train.

Consequently, there has not been time heretofore to prepare a reply brief.

Scope of Argument

In footnote 2 at page 5 of the Trustee's brief, it is stated that in five of our cases "no rejection ever occurred". At page 11 of the Trustee's brief, it is stated that in five of our cases the leases were rejected by the Trustee. The Trustee's reference is to formal, express notices of rejection. We deem the Record to be clear upon the point that such formal notices of rejection were given in five of our cases; but we believe, further, that whether the correct number is four or five is immaterial, because our position (to which point alone this reply brief addresses itself) is as follows:

> *That there is no distinction of substance between the five claims in which formal notice of rejection was given by the Trustee, and the four cases in which such formal notice was not given.*

Argument

In bankruptcy, rejection by the Trustee of an unexpired lease is merely a refusal by the Trustee to assume the same.

The only choice which the bankruptcy Trustee has in respect of an unexpired lease is to elect whether or not

he will assume it; and if the Trustee elects not to assume an unexpired lease, he has thereby rejected it.

Rejection of a lease is an actuality, and either occurs or does not occur. The test is one of fact—whether the Trustee has assumed the lease or has not assumed it. Giving notice of rejection adds nothing to the fact; and the absence of notice of rejection detracts nothing from the fact.

In all of our claims, there had been rejection of the leases *in fact*.

Certainly the Trustee will not take the position that any of our leases were assumed by it. The Record shows that the Trustee made it known to all landlords, by circular letter dated as early as September 22, 1932, that it would be obliged to reject burdensome leases (Trustee's Ex. A, R. 4-5). This was followed by further notice to the same effect under date October 6, 1932 (Trustee's Ex. B, R. 6-9).

The Trustee's foregoing communications were followed by its circular letter of November, 1932 (Trustee's Ex. C, R. 9-11). By that time, the Trustee had clearly decided upon refusal to assume our leases. Indeed, none of the agreements in our cases was signed by *any* party thereto before November 15; none of these agreements was completely executed before the end of November, 1932; seven of our nine agreements were not executed until December, 1932; and one of our agreements was not executed until January 16, 1933.*

In negotiating with our landlords for the assignment agreements, the Trustee was obviously taking the position

* At page 6 of our Main Brief, in the text and in footnote d we have given, by inadvertence, the dates *as of* which these agreements are executed. In point of fact, as appears from the acknowledgments, the agreements were not executed until the later dates set forth above.

that our leases were leases which it had elected not to assume; else there would have been no occasion for the negotiations or for making the agreements. It could only have been upon the basis of *rejection in fact* that the agreements were made at all.

Concededly, the agreements are the Trustee's writings. They show, upon their face, that the Trustee itself considered that the leases which were the subject of these agreements had been rejected by it, without regard to whether formal notice of rejection had been sent out in any particular case or not; for upon the face of each of the very agreements as to which the Trustee says there were no rejections, in the last paragraph thereof, the Trustee particularly and explicitly stipulates as follows:

> "The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, * * * *does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.*"*

There is thus no difference in substance or in legal effect between those of our cases in which formal notices of rejection were sent out, and those of our cases in which such notices were not sent out. At the date of each of our agreements, the Trustee had made its election between the only alternatives open to it, namely, whether to assume or not to assume the leases. In each of our cases, the Trustee had chosen to reject, and by its own agreements the Trustee was safeguarding itself against impairing the effectiveness of the elections thus made by it.

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* The typographical emphasis is ours. The quotation is taken from R. 44, and the same language will be found in the other four agreements with respect to which there had been no express rejections—R. 154, 179-80, 229.

It should be added that the listing at R. 321, of leases rejected and not rejected by the Trustee, has to do only with the question whether or not formal notice was sent out; it does not deal with the substance.

Conclusion

The judgment of the Circuit Court of Appeals should be reversed as to all nine of the claims in our case.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

MURRAY C. BERNAYS,
GILBERT, DIAMOND & BRANDEIS,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1936

No. 436

In the Matter
of
UNITED CIGAR STORES COMPANY OF AMERICA,
DEBTOR

ABE SCHWARTZ, *et al*
Petitioners

v.

IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, *et al.*

REPLY TO RESPONDENTS' SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION AND PETITION FOR REHEARING

SUSAN BRANDEIS
Counsel for Petitioners

MURRAY C. BERNAYS
GILBERT, DIAMOND & BRANDEIS
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1936

IN THE MATTER *of* UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ABE SCHWARTZ, *et al., Petitioners,* *v.* IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, *et al.*	**No. 436**

REPLY TO RESPONDENTS' SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION AND PETITION FOR REHEARING

Counsel for the Trustee has been good enough to serve Mr. Bernays, who argued on our behalf, with a copy of the Trustee's "Suggestion for Amendment of the Court's Opinion, and Petition for Rehearing."

It is said therein (p. 5), in criticism of the second sentence of the Court's opinion (Trustee's italics):

> "* * * *it is expressly stipulated* that in four of the cases the lease had *not been rejected* by the Trustee. See Schedule A to the Stipulation, R. 321."

But until the instant proceeding was instituted by the Trustee, it was common ground between us and counsel for

the Trustee in what sense the word "rejected" was used in the Schedule A to which the Trustee refers. The word was used as referring *only to formal written notice of rejection.*

Before the oral argument herein, the meaning of the stipulation at R. 321 was the subject of discussion between counsel for us and for the Trustee. They agreed that, as stated, the meaning of that stipulation was only that in the nine claims *formal written notice of rejection* had or had not been sent by the Trustee as recorded in the stipulation, and that the stipulation did not dispose of the question whether there was a rejection in fact or in law.

The very part of the record to which the Trustee refers was cited, and the above interpretation thereof was set forth, in the last paragraph of our Reply Brief. Before that Reply Brief was filed, printer's proof thereof was submitted to counsel for the Trustee with the request that any objections to the filing thereof or to any statements made therein, be communicated to our counsel before the brief was finally printed. No objection of any kind was made either to the filing of the brief or to any statement made therein.

The whole issue of rejection was abundantly before the Court. It was referred to at the very outset of the main argument of our brief, at page 11, footnote 1. It was referred to twice in the Trustee's brief at footnote 2 at page 5, and at page 11. The attention of the Court was drawn to the issue emphatically; indeed, our Reply Brief discussed nothing else.

In the Trustee's present "Suggestion," there is no statement that the Trustee denies that there were in fact and in law rejections in *all nine* of the petitioners' claims.

The Trustee does not deny that a "rejection" under the Bankruptcy Law as it existed before the passage of Section 77B was ever anything but the Trustee's election, shown by any act or statement that it chose not to affirm a lease. It is not denied that the whole purpose of a formal written rejection was merely a matter of precaution, so that any other act or statement of the Trustee might not be misinterpreted as an election to affirm. In other words, although there were rejections in all nine of the claims herein and the Trustee does not deny it, it does not wish the Court to say so.

We deem it only fair that the facts set forth herein should appear upon the Court's records, and respectfully beg that this suggestion as to the said facts shall be accepted by the Court for its files.

As to the petition for rehearing, the Court is pointed to no oversight of fact or error of law.

The petition for rehearing is directed solely to the interpretation of the riders. Of the twenty-one pages of argument in the Trustee's main brief, nineteen were devoted to the interpretation of the riders, and indeed, that interpretation was the sole substantive matter to which the Trustee's main Brief was addressed.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

MURRAY C. BERNAYS,
GILBERT, DIAMOND & BRANDEIS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936,

No. 436.

IN THE MATTER

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*;

Petitioners,

against,

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

WILLIAM D. WHITNEY,
Counsel for Respondent, Irving Trust Company, as Trustee.

DONALD C. SWATLAND,
R. L. GILPATRIC,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

IN THE MATTER
of
UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor,

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,
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IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA; *et al.*,
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No. 436.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

Opinions Below

The opinion of the Special Master (Irwin Kurtz, Referee in Bankruptcy) appears on page 739 of the record and is not reported. The District Court (Judge Coxe) rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 83 F. (2d) 202, the dissenting opinion of Judge A. N. Hand appearing at page 206. The opinion of the Circuit Court of Appeals on its denial of a rehearing is reported in 85 F. (2d) 11.

PRELIMINARY JURISDICTIONAL POINTS.

1. There are no petitioners other than the Joseph E. Otis Estate Land Trust.

The petition purports to be on behalf of 94 different petitioners, each of them a different claimant in a bankruptcy proceeding. However, the petition only names one claimant, the Otis Trust, the precise language being:

> "Your petitioners, the Joseph E. Otis Estate Land Trust, together with 93 other petitioners, pray that a writ of certiorari issue," etc.,

and the petition being signed only on behalf of the

> "Joseph E. Otis Estate Land Trust, *et al.*"

In other words, it is evidently the theory of the petition that the Court must search the record to determine precisely who are the petitioners. It is respectfully submitted that this is error, and that by definition a "petition" can only be entertained on behalf of those parties who caused themselves to be named in it, or who at least signed it. On this view, only the petition of the Otis Land Trust could be entertained.

2. In any event, the petition was filed after three months had expired from the date of the final judgment in respect of 85 out of the 94 claims.

The opinion of the Circuit Court of Appeals in respect of all 94 claims was filed April 6 (R. 780). A judgment was duly entered thereon on April 13 affirming the decree of the District Court and ordering that a mandate issue (R. 790-791). The petition for a writ of certiorari was

filed October 5, clearly outside the statutory three months' period.

On April 21, 1936, however, there was filed in the Circuit Court of Appeals a petition variously entitled as follows:

> "Petition of *Certain* Appellants for Rehearing" (R. 791); and
>
> "Petition for Rehearing With Respect to *Certain* Claims Herein" (R. 793);

and opening as follows:

> "To the Honorable Judges of the Circuit Court of Appeals for the Second Circuit:
>
> This petition for rehearing is made with respect to the *nine claims* involving qualified agreements of assignment and release[1] * * *
>
> [1]Nos. 5235 Excell Trustees, 5277 Wm. E. and Warren H. Munk, 5286 Simon Lorch, 5302 Louise S. Whitcomb and Florence Welch, 5304 Abe and Myrtle Schwartz, 5312 Isidor A. and Flora L. Rubel, 5341 Thos. H. Brown et al., 5406 Herbert and Sigmund Livingston, as Trustees, and 5421 J. E. Nunn." (R. 793)

Indeed, there can be no dispute but that the entire purport of the petition for rehearing was that it was filed on and in respect of 9 claims only (R. 791-803). On July 6, the Circuit Court of Appeals filed its opinion and entered its judgment denying the petition for rehearing of the 9 claimants (R. 803-806).

The petition for writ of certiorari having been filed on October 5, it is timely as to those 9 claimants, subject to the point already made that none of said 9 claimants are named

in the body of the petition for writ of certiorari[1] or signed the same.

3. Summary.

It appears to be beyond possible dispute that there are properly before this Court at most only the 9 claimants in respect of which the petition for writ of certiorari was filed within three months after the denial of the petition for rehearing, and that on no ground can the petition be treated as having been timely filed here as to the other 85 claimants.

The only petitioner directly named in the petition or which signed the petition was one of the 85. If that name, the Joseph E. Otis Estate Land Trust, be eliminated, the petition is in substance simply presented as a petition on behalf of certain unnamed petitioners, for the names of which the Court must either search the record or draw an inference from a foot-note in the petition.

Without waiving any of the foregoing points we will, in the balance of this brief, treat all 94 claims *as if* a petition in respect thereto had been properly and timely filed.

DISCUSSION ON THE MERITS

Types of Claims Presented

The claims here fall into two broad classifications, (1) 85 of them being claims of landlords who executed unqualified releases to the Debtor prior to the filing of the

---

[1]The 9 claimants are named in an explanatory footnote at page 2 of the petition for writ of certiorari; and an incidental question may be thereby presented as to whether this Court will search the petition for an inference from a foot-note that parties named therein are intended to be petitioners.

petition under Section 77B of the Bankruptcy Act, and (2) 9 being claims of landlords whose releases were qualified by a rider negativing the waiver by the landlord

> "of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *" (R. 784).

The Circuit Court of Appeals was unanimous in rejecting claims of the first type, but Judge A. N. Hand dissented as to claims of the second type. As to claims of the first type, the court below recognized that clearly there was no obligation remaining on the part of the Debtor to the landlord after the execution of the release; as to claims of the second type, on the other hand, a question was presented as to (i) whether the rider had the effect of reserving the right to prove claims merely against the estate as then administered in normal (pre-§77B) bankruptcy proceedings, as was contended for by us and was the view adopted by the majority of the Circuit Court of Appeals, or (ii) whether the rider also had the effect of reserving the right to prove claims against the Debtor itself, and consequently to prove them in subsequent 77B proceedings, as was contended for by the claimants and was the view adopted by Judge A. N. Hand. The claim of Mrs. John S. Meadows, in respect of which this Court granted petition for writ of certiorari on Monday, October 26, October Term 1936, No. 151, was a claim of the second type.

Statute Involved

The provisions of Section 77B of the Bankruptcy Act dealing with landlords' claims are set forth in the Appendix to this brief.

The Facts in Greater Detail

The petitioners comprise 94 former landlords[2] of the Debtor who in the latter part of 1932 and early in 1933, during the prior bankruptcy proceedings of the Debtor, entered into contractual arrangements with the Debtor and its trustee in bankruptcy resulting in the termination of all further liability on the part of the Debtor under their leases. All of the leases involved had been found burdensome by the bankruptcy trustee; and the bankruptcy trustee had thereupon been authorized by the court to disaffirm unless the landlords were willing to agree to modifications or, in cases where the trustee had determined not to continue, to accept surrenders by taking assignments of the leases and the subleases.

Thereupon, all of the 94 claimants here executed agreements with the bankruptcy trustee. In 42 of those agreements the claimants agreed to modifications of their leases and accepted new tenants, thereby effecting novation (R. 785), and in 50 other instances there were agreements for surrender or termination of the leases (R. 786). Each of those 92 agreements also contained a release of all claims against the Debtor. The remaining 2 agreements contained simply a release, for a cash consideration[3] (R. 786).

About eighteen months after these arrangements were completed, Section 77B was enacted, and proceedings were

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[2]These 94 claimants were grouped in one proceeding, because all are represented by one attorney (Solomon E. Harrison, of Chicago) who, with his associates, was responsible for the solicitation and filing of, and has a substantial contingent interest in, their claims (R. 524, 562, 570, 697).

[3]The findings of the court below to which reference is here made, were based on a voluminous and detailed record and are not challenged in the petition.

begun thereunder by the Debtor. The petitioners herein then filed claims "for injury resulting from the rejection" of their leases or "for damages or indemnity" under covenants in such leases (R. 8). All of the claims were ordered expunged by the District Court (R. 752), acting on the recommendation of the Special Master (R. 739). The Circuit Court of Appeals affirmed on the ground[4] (R. 787)

> "* * * that, as none of the claims arose from the rejection of leases and all the original leases upon which they are based were terminated by agreement of the parties before these proceedings were instituted and, indeed, before section 77B was passed, and the leased real estate surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee, this debtor, the lessors have no valid claims for future rent."

ARGUMENT

I.

BY RELEASING THE DEBTOR FROM ALL LIABILITY, THE PETITIONERS RELINQUISHED THE RIGHT TO CLAIM UNDER SECTION 77B.

The decision below turned upon the effect to be given to certain agreements entered into between the petitioners and the Debtor before Section 77B became law. Under the interpretation put upon these agreements by the Circuit Court of Appeals, the petitioners are not creditors of the

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[4]It was also urged below on behalf of the petitioners that the releases were obtained through "subtle duress" practiced by the Trustee, but this argument also was rejected at all stages of the proceedings below (Special Master, R. 751; Circuit Court of Appeals, R. 785).

Debtor at all, and this quite regardless of what significance is attached to the provisions for landlords' claims in Section 77B. Thus, although the petition speaks in terms of important questions of statutory construction, what the petitioners are really asking is that this Court rewrite their contracts. Such relief is, of course, not within the province of any Court to grant.

The petition itself, aside from stressing the fact that the case involves "a great group of landlords' claims" offers only two reasons why a writ should be granted. Both would involve interpretation of the provision in Section 77B relating to landlords' claims; but in our view neither is raised by this case.

(1) The petition urges first that the court below failed to give effect to the alternative character of the statutory provision. The argument is that in limiting a landlord to "a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (R. 787); the decision below overlooked the alternative claim provided by the statute "for injury resulting from the rejection of an unexpired lease".

The question, therefore, which this Court is asked to pass upon is whether the rejection of a lease *without more* constitutes the basis of a claim under the statute.

But this question is not presented by any of the petitioners' claims. It might have been, in the 38 cases where the leases were in fact rejected by the Debtor's trustee in bankruptcy, if such leases had not been subsequently terminated and claims thereunder released. But what their claims *would have been* if these 38 landlords had stood on their rights and held the Debtor to its obligations is now a matter of no moment. They, like the other 56 landlords in

this case whose leases were never rejected (R. 700), expressly released the Debtor, and all but 2 of them at the same time agreed to the surrender or cancellation of their leases.[5]

(2) The second point urged in the petition is that Congress, in measuring the landlord's three-year claim from the "date of surrender *of the premises* to the landlord or the date of reentry of the landlord", intended landlords' claims to survive surrender *of the leasehold estate.* But this question is likewise not presented by any of the petitioners' claims. Each of the 50 landlords who accepted a surrender in this case also gave a release of any claims which he might have against the Debtor; and these releases are broad enough to include any claims arising from such rejection.

As stated in the opinion below (R. 787):

> "The issue here is not one of the provability of actual claims for future rent, but rather one of recognition that the claimants have no claims at all against the debtor or its estate."

We do not say that under no circumstances would the rejection of a lease give rise to legal injury and consequently to a claim under statute. In the instant case, however, no legal injury was sustained, and even if any claims therefor ever arose these claims have been released.

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[5]These two executed releases to the Debtor for a cash consideration.

II.

THE QUESTION OF THE PROPER CONSTRUCTION OF THE 9 QUALIFIED RELEASE CONTRACTS, WHICH WAS DECIDED ADVERSELY TO THE PETITIONERS BELOW, DOES NOT CALL FOR A REVIEW BY THIS COURT.

As to 9 of the 94 claims here involved, there was a qualification of the effect of the agreements executed by the landlords whereby the leases were surrendered and the Debtor was released from further liability. The qualification took the form of a rider negativing the waiver by the landlord

> "of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *." (R. 784)

It was argued below for these 9 landlords that the effect of the rider was not only to preserve whatever claims the landlord could prove under the bankruptcy law as it then (in 1932) stood[6], but also to obtain for the landlord the advantage of any change in the bankruptcy law which Congress might make in the future. A majority of the court below held, however, that in the light of the surrounding circumstances this was not "the natural and reasonable meaning of the language used" (R. 805).[7]

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[6]At the time the releases were given this Court had not yet decided *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, holding the future rent claims non-provable under Section 63a of the Bankrupcty Act prior to its amendment in 1934.

[7]The correctness of the interpretation put upon the petitioners' contracts by the majority of the court below is perhaps indicated by the fact that although similar qualified releases of the Debtor were executed by over 165 of its former landlords, only 50, including the 9 here involved, have sought to file claims in these proceedings.

As the petition concedes, questions as to the proper construction of a contract provision are not grounds for granting certiorari. Nor, we submit, should this salutary rule be changed by the mere fact that the terms of the contract to be construed relate to various aspects of federal procedure,—"bankrupt estate", "provable claims", "the Bankruptcy Court". The governing question is still, as in all contract cases, what was the intent of the parties; and it was on this question that the Court below divided. Indeed, on this aspect of the case the only evidence in the record consists of, and all of the arguments made below for the petitioners were based upon, the negotiations by and between the bankruptcy trustee and its attorneys, the Debtor and its attorneys, and the petitioners and their respective attorneys and representatives, leading up to the execution of the agreements in question.

CONCLUSION

The petition for a writ of certiorari should be denied, with costs.

WILLIAM D. WHITNEY,
Counsel for Respondent,
Irving Trust Company,
as Trustee.

DONALD C. SWATLAND,
R. L. GILPATRIC,
Of Counsel.

APPENDIX

Statute Involved

"The term 'creditors' shall include for all purposes of this section and of the reorganization plan its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." Bankruptcy Act § 77B (b) (10), 11 U. S. C. A. Sec. 207 (b) (10).

FILED
DEC 14 1936
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436

IN THE MATTER

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor,

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT TRUSTEE

WILLIAM D. WHITNEY,
Counsel for Respondent, Irving Trust Company, as Trustee.

DONALD C. SWATLAND,
R. L. GILPATRIC,
Of Counsel.

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Sand Filtration Corporation v. *Cowardin*, 213 U. S. 360, 364 13

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TABLE OF STATUTES CITED

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Supreme Court of the United States

OCTOBER TERM, 1936.

In the Matter *of* UNITED CIGAR STORES COMPANY OF AMERICA, *Debtor,*	
JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*, *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, *et al.*, *Respondents.*	No. 436

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT TRUSTEE

OPINIONS BELOW

The opinion of the Special Master appears on page 324 of the record and is not reported: The District Court affirmed without opinion (R. 337). The opinion of the Circuit Court of Appeals is reported in 83 F. (2d) 202, the dissenting opinion of Judge A. N. Hand appearing at page 206. The opinion of the Circuit Court of Appeals on its denial of a rehearing is reported in 85 F. (2d) 11.

STATUTE INVOLVED

The provisions of Section 77B(b) of the Bankruptcy Act dealing with landlords' claims are set forth in the Appendix to this brief.

OUTLINE OF CASE

This case involves claims for future rent asserted under Section 77B of the Bankruptcy Act by nine former landlords of United Cigar Stores Company of America, a New Jersey corporation (hereinafter called the Debtor).

At the commencement of the Debtor's bankruptcy on August 29, 1932, the Trustee in Bankruptcy was faced with the heavy task of dealing with approximately 1,000 leases, most of which were burdensome (R. 262). The problem was resolved by the preparation of various forms of agreement with various classes of landlords, of which the forms involved in this case provided for an assignment of the lease itself and the subleases (including rentals due from subtenants) by the Trustee *and by the Debtor*, for the assumption of the obligations under the lease by the landlord himself, and for the release by the landlord of the Trustee, the Debtor and the Debtor's bankrupt estate (R. 41). It was desirable from the landlord's point of view that he be relieved from undertaking dispossess or other common law proceedings to end the term as against the Debtor itself, and that he obtain the sub-tenancies which otherwise would revert to the Debtor upon rejection by the Trustee. Accordingly, participation by the Debtor in the negotiations was not a mere formality. The Debtor was represented by its own counsel (R. 277 *et seq.*), and ex-

acted and received in all cases a release running to itself (R. 271). In certain cases *this release* was qualified by a rider; and the meaning of that rider provides the distinctive question in the nine claims involved in this case. All of the agreements executed by the petitioners were entered into between October 19, 1932, and December 3, 1932.

About a year and a half later Section 77B was enacted (June 9, 1934), and the Debtor filed its petition for reorganization thereunder. Among those who filed claims in the 77B proceedings were 94 claimants, whose claims have successively been ordered expunged by the Referee in Bankruptcy (sitting as Special Master), the District Court, and the Circuit Court of Appeals (one judge dissenting), on the grounds that the claimants had, prior to Section 77B, contracted away their rights against the Debtor and that Congress had not, by Section 77B, given them new rights. Nine of these claimants (herein referred to as the petitioners) have now been granted writs.

ISSUES PRESENTED

The respondent Trustee agrees with the petitioners that there are two principal issues presented:

> *First,* whether a claim may be presented by a landlord in a 77B proceeding where there is no liability under the substantive law of landlord and tenant due to the prior termination of the lease and release of the tenant; and
>
> *Second,* whether the claims in this case have been released, notwithstanding the effect of the rider purporting to qualify the release.

The first question is the same that has been presented in the preceding case, *In the Matter of United Cigar Stores Company of America, City Bank Farmers Trust Company* v. *Irving Trust Company,* No. 260, where the Debtor's liability was terminated prior to Section 77B by constructive surrender rather than by express surrender and release, as is the situation in this case.

The second question lurks in the record in the next preceding case, *In the Matter of United Cigar Stores Company of America, Meadows* v. *Irving Trust Company,* No. 151, although the effect of the qualifying rider was not expressly considered by the Circuit Court of Appeals in that case.

Argument as to the first point will have been fully made in respondent's brief in the *City Bank Farmers* case, No. 260, and will not be repeated herein. On the second point, the principal argument was reserved in respondent's brief in the *Meadows* case, No. 151, so that it might be fully presented herein.

DETAILED STATEMENT OF FACTS

Each of the petitioners had, prior to the Debtor's adjudication in bankruptcy on August 29, 1932, made leases to the Debtor of real property part of which was occupied by one of the Debtor's cigar stores and the balance sublet to others.[1] All nine leases were found burdensome by the Trustee in Bankruptcy who was thereupon authorized by the Referee (now the Special Master below) either to reject the leases or, in lieu thereof and at the landlord's election, to assign them back to the landlords together with the sub-

[1]R. 59, 80, 100, 169, 182, 193, 222, 232 and 234.

leases thereunder. Each of the petitioners chose to take assignments,[2] and agreements so providing were accordingly entered into during the months of October, November and December, 1932.[3] The agreements were on printed forms, devised by the Trustee to standardize the procedure in dealing with the one thousand or more leases under which the Debtor was tenant (R. 262), and each agreement made provision for[4]

> (i) the assignment of the lease and subleases to the landlord[5] together with any unpaid rents accrued or to accrue from subtenants after September 1, 1932 (the first rent day after the adjudication) (R. 42);
>
> (ii) the turn-over by the Trustee of rents collected by it prior to the assignment (R. 42);
>
> (iii) the assumption by the landlord of all existing and future obligations required under the terms of the lease or the subleases to be performed by the Debtor (R. 43); and

---

[2]In 4 instances the assignments were not requested by the landlords until after the Trustee had rejected the leases, so that in these cases the assignments were made by the Debtor alone (R. 84, 187, 236 and 249). In the other 5 cases no rejection ever occurred, the assignment being made by the Trustee and Debtor acting jointly (R. 74, 150, 177, 213 and 236).

[3]R. 73, 83, 149, 176, 186, 212, 225, 235 and 248.

[4]The record references that follow are to the standard form of agreement executed by eight of the petitioners, the only change being that in the cases where the lease had been rejected prior to assignment, there was no provision for the Trustee joining in the assignment (Note 2, *supra*). The form of agreement entered into by the ninth petitioner (Brown) appears at R. 51.

[5]In the *Brown* case the assignment of the lease ran to the landlord's nominee (R. 212-221).

(iv) a general release in favor of the Trustee, the bankrupt estate and the Debtor

> "from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, * * *" (R. 43)

to which was added a typewritten rider stating that nothing in the release should

> "be deemed a waiver by the Landlord of the right to prove against the Bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *" (R. 76).[6]

All of the agreements so entered into were fully consummated, and the petitioners have retained whatever benefits they received.

Some eighteen months later, Section 77B was enacted, and the Debtor filed its petition for reorganization thereunder. Thereafter, notwithstanding the terms of the agreements which they had entered into with the Debtor, the petitioners each filed claims, using the statutory terminology, "for injury resulting from the rejection of an unexpired lease" or "for damages or indemnity under a covenant contained in such lease". The Reorganization Trustee (joined in by the Debentureholders and Preferred Stockholders Committees and a landlord intervenor) objected to every claim as without merit, upon the ground that not one

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[6]In the case of *Munk* the rider modified the assumption provision as well as the release provision, and in the *Rubel* and *Livingston* cases the rider was applicable to the entire agreement.

of the petitioners was a creditor of the Debtor when Section 77B became law.

SUMMARY OF ARGUMENT

I

We have argued in the preceding case, *In re United Cigar Stores Company of America, City Bank Farmers Trust Company* v. *Irving Trust Company, No. 260,* that Section 77B did not *create* claims where none existed. So where a landlord has accepted a surrender of his lease from the Debtor, or assumed the Debtor's executory obligations thereunder, or released the Debtor from further liability, no claim could thereafter be asserted by the landlord under his lease, except such as had been expressly reserved in the agreement providing for the assignment, assumption or release.

All of the petitioners in this case are landlords in this situation, except that each contends that he effected such a reservation by means of a rider to his agreement with the Debtor. The major question, common to the cases of all nine petitioners, is therefore the interpretation of the rider.

The cases come here upon concurrent findings by two courts below to the effect that the intention of the parties, in employing this rider, was to reserve claims that might be allowed under the Bankruptcy Act as it then stood, but not as it might be amended in the future. It is an established rule in this Court that concurrent findings of two courts below will not be disturbed unless clearly erroneous.

Passing to the merits of the controversy:

It is the respondent's position that the provisions of the rider were intended only to reserve, and had the effect only of reserving, the right to prove *then* existing claims, and that the rider was neither intended to preserve, nor could it have had the effect of preserving, a power in the petitioners to assert other claims of a character not then contemplated but which might be provided for by subsequent bankruptcy legislation. The respondent submits that the language employed in the rider, whether construed *verbatim* or in its context, indicates that the parties must have intended only to reserve existing claims. Certainly, the language does not expressly reserve such claims as might be created by future legislation. At the least, therefore, the general creditors and stockholders of the Debtor are entitled to have this question determined upon a construction of the clause in the light of the circumstances existing at the time of its use.

The various agreements were executed between October and December of 1932. During that period no legislation was pending in Congress looking to the recognition of landlords' claims other than those already provable in bankruptcy. On the other hand, there were certain types of claims which were then definitely recognized as provable, or might then be claimed under existing law by these landlords. *First,* at least six of these landlords had claims for back rent (in the form of taxes) accrued but unpaid by the Debtor; and in fact they subsequently proved these claims in the bankruptcy proceedings and were paid dividends thereon. Without the rider, such claims would have been released. *Second,* it was then understood that landlords' claims for future rent might possibly be determined to be

provable by judicial decision, through application of the anticipatory breach doctrine, *cf. Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581. This question was not authoritatively settled until the decision of this Court in *Manhattan Properties Inc.* v. *Irving Trust Company,* 291 U. S. 320.

In inserting the riders, the parties did not delete the release provision itself. Every provision in a contract must be given a meaning. The meaning of the release provision (when read together with the rider) is that the landlord released the Trustee, the bankrupt estate, and the Bankrupt [the Debtor] from all claims which might arise in the future, while reserving claims already existent. Were the qualifying rider to be construed as petitioners desire, *i.e.,* as reserving the right to prove all claims either then existing or which might arise in the future (by legislation or otherwise), the release provision itself would be entirely nullified.

Finally, had it been desired to reserve the right to prove such claims of an entirely new character as might be created by subsequent statute, that intention could easily have been expressed; but it was not.

II

All of the foregoing arguments apply to *all* of the petitioners. The following arguments apply to seven of the nine petitioners, *i.e.,* all except *Rubel* and *Livingston.*

In the cases of these seven petitioners, the rider qualified *only* the release clause, but did not qualify the clauses by which the landlords accepted assignments of their leases

from the Debtor.[7] Accordingly, in those seven cases, even if we are wrong in our first point, the petitions must be dismissed if we were right in our contentions in the *City Bank Farmers Trust Company* case, *No. 260.*

The petitioners suggest that, notwithstanding that the rider expressly does not qualify the assignment provision (in seven cases), or the assumption provision (in six cases), it should be construed to do so contrary to its terms, because otherwise it would serve no purpose. The suggestion, although in conflict with the express language of the agreement, might perhaps be sound if, in fact, the release clause served no purpose beyond that accomplished by the assignment and assumption clauses. However, the release clause did accomplish this additional purpose; that, although the assignment and assumption provisions alone would have left the landlord entitled to prove existing claims, these also were discharged by the release clause. To attach a qualifying rider to the release clause, was therefore to preserve existing claims.

III

It is unnecessary to consider the argument of the petitioners as to the meaning of the statutory provision for injury resulting from "rejection" of their leases, for,

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[7]In six of the seven cases (all except *Munk*), the rider was also not expressed to qualify the agreement by which the landlord undertook to assume all of the obligations of the Debtor under the lease. But as it is the assignment agreement that constitutes surrender by the Debtor and acceptance thereof by the landlord, with the effect of terminating the lease, the *Munk* claim is in no different position than the other six claims as to which the assignment provision was not qualified.

although in five of these cases the leases were rejected by the Trustee, no claim for injury therefrom survived to the enactment of Section 77B because of the execution and performance in the interim of the assignment, assumption and release agreements. Our position is the same as in the next preceding case, *City Bank Farmers Trust Company* v. *Irving Trust Company,* No. 260, the only difference being that in that case the surrender occurred as a result of conduct of the landlord and in this case the surrender was by express agreement.

ARGUMENT

POINT I

THE PARAMOUNT QUESTION TO BE DETERMINED IS THE INTENT OF TWO PARTIES TO A CONTRACT (THE DEBTOR AND THE LANDLORD), AND AS THE TWO COURTS BELOW MADE THE SAME FINDING ON THIS SUBJECT, THE RULE APPLIES THAT THIS COURT WILL NOT DISTURB THE FINDING UNLESS CLEARLY ERRONEOUS.

As pointed out in the Summary of Argument, the principal question in this case is the construction of a particular provision in a contract (the so-called qualifying rider), interpreted in the light of the intention of the parties and the surrounding circumstances at the time of its execution. Both courts below (one judge dissenting in the Circuit Court of Appeals) concurred in the conclusion that the rider referred, and was intended by the parties only to refer, to such claims as might be provable by the parties under the Bankruptcy Act as it existed at the time that the con-

tract was made (1932). In such a case, it is a firmly established doctrine in this Court that, before this Court will reverse the two concurring lower courts, the petitioner must sustain the burden of showing that such courts were clearly erroneous in the inferences which they drew from the undisputed facts. The affirmation of the holding of the courts below would represent merely the application of

> "* * * the familiar principle, repeatedly applied in our decisions, that the concurrent findings of the courts below will be accepted by this court 'unless clear error is shown' ".. *Radio Corporation* v. *Radio Engineering Laboratories*, 293 U. S. 1, 6.

It is well established that not only findings of fact, but the inferences gathered from them by the lower courts, will not be disturbed unless clearly erroneous. *United States* v. *Commercial Credit Co., Inc.*, 286 U. S. 63, 67; *Continental Illinois Nat. Bank & T. Co.* v. *Chicago, etc. R. Co.*, 294 U. S. 648, 678; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 558; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78.

POINT II

THE QUALIFYING RIDERS DID NOT HAVE THE EFFECT OF RESERVING TO THE PETITIONERS THE RIGHT TO ASSERT CLAIMS NOT AT THE TIME PROVABLE, BUT WHICH MIGHT BE MADE SO BY SUBSEQUENT LEGISLATION.

The petitioners urge that the effect of the qualifying rider was not only to preserve whatever claims they could prove under the bankruptcy law as it then (in 1932) stood,

but also to obtain for them the advantage of any change in the bankruptcy law which Congress might make in the future. A majority of the court below held, however, that in the light of surrounding circumstances this was not "the natural and reasonable meaning of the language used".

The accepted guides of interpretation are not subject to dispute. First must be considered the language actually used which, in the absence of ambiguity, of course, controls (*Atwater* v. *Guernsey*, 254 U. S. 423). Secondly, the terminology employed in the instrument must be "read in the light of the circumstances existing at the time of negotiations leading up to its execution" (*Miller* v. *Robertson*, 266 U. S. 243, 251). Thirdly, the particular provisions are to be construed in their context, so that all the terms of the contract may, if possible, be harmonized and given effect (*Green County* v. *Quinlan*, 211 U. S. 582, 594). Finally, a court is not free "either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of" (*Harrison* v. *Fortlage*, 161 U. S. 57, 63).

Before discussing whether these canons of construction were correctly applied below to the facts at hand, it should be noted that the interpretation contended for by the petitioners has been overruled not only by a majority of the Circuit Court of Appeals but also by the Special Master, whose conclusions as trial judge were based not only on the record before him but also on facts of which he, as the Referee in charge of the prior bankruptcy proceedings of the Debtor, had knowledge and very properly took judicial notice.

As stated by this Court in *Sand Filtration Corporation* v. *Cowardin*, 213 U. S. 360, 364:

> "The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made. * * *"

See also *Mobile & Montgomery Ry. Co.* v. *Jurey*, 111 U. S. 584, 592; *Union Pacific Ry. Co.* v. *Chicago, etc. Ry. Co.*, 163 U. S. 564, 582.

The Special Master's findings are, of course, presumptively correct under Rule XLVII of the General Orders in Bankruptcy of this Court.

(A) The language used in the qualifying riders.

The rider in question was expressed as negativing a waiver by each petitioner of

> "the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord *is* entitled, but this shall not be deemed to render any claim a provable claim which *is* not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proving or allowance." (Italics inserted.)

If we put ourselves (as we must) in the situation of the parties at the time—the fall of 1932—when the releases were given, it becomes evident that the bankruptcy terminology employed in the qualifying rider was used with its then current meaning.

> " * * * It is not to be assumed, therefore, that the comprehensive phrases of the lease, all of which

were quite germane and appropriate to existing conditions, were intended to apply to future events not then in contemplation." *Herald Square Realty Co.* v. *Saks & Co.*, 215 N. Y. 427, 431.

What the petitioners are doing, however, is construing the words in a sense which they could only have acquired a year and a half later when Section 77B was enacted, *i.e.* the words "the bankrupt estate" to mean "the *Debtor's* estate", the words "*is* entitled" to mean "is or *hereafter may become* entitled", and the words "Trustee in Bankruptcy" to mean "*Trustee in reorganization proceedings*". To determine whether such a construction is justified, we must look at the context of the language and the circumstances surrounding its use.

(B) The context of the qualifying riders.

To give effect to the interpretation being urged by the petitioners, a court would be required not only to do violence to the language chosen but also to disregard the setting in which such language was used.

The general release runs in favor of three different parties:

(*i*) Irving Trust Company individually, and in its capacity as Receiver, and as Trustee in Bankruptcy of United Cigar Stores Company of America,

(*ii*) the bankrupt estate, and

(*iii*) the Bankrupt.

The qualifying rider, however, applies only to claims provable against *the bankrupt estate.*

In other words, the rider does not apply at all to the release of claims against "the Bankrupt". Yet the whole case is concerned with the question as to whether, now that "the Bankrupt" has become "the Debtor" and its stockholders have become entitled to rights in reorganization proceedings, the landlord has a claim which he would not have had prior to Section 77B. It is impossible to discern any meaning which can be given to the release of "the Bankrupt",—which release is expressly *not* qualified by the "rider",—unless it be to release such claims as might be asserted against the Debtor and the interests of its stockholders.

(C) The circumstances surrounding the execution of the releases.

By the preponderance of the evidence as to surrounding circumstances, the petitioners, the Debtor and the Trustee in Bankruptcy were contracting with a view to two situations which were recognized by all the parties as being affected by the general release unqualified; namely, (1) the back taxes which the Debtor owed as rent, and (2) the uncertainty as to the provability of future rent claims under the then subsisting law.

(i) *The application of the qualifying riders to claims for taxes accrued and unpaid.*

It cannot be denied that most of the petitioners, having made net leases under which the Debtor was obligated to pay taxes, had foremost in mind recovering accrued but unpaid taxes. So runs the only testimony for the petitioners on this point (R. 308). Indeed, six out of the nine petitioners subsequently did file and were allowed claims

(on which 50% in dividends was paid) which would have been subject to disallowance if the releases granted by them had not been qualified to except provable claims.[8]

From the standpoint of the Trustee, there is no question but that the reservation was intended primarily to protect claims for unpaid taxes which had accrued prior to bankruptcy. This is evident both from the testimony of the Trustee's representative at the trial (R. 271) and from the written instructions issued by the Trustee to its representatives contemporaneously with the negotiation of the assignment agreements (R. 19).

From the standpoint of the Debtor, the rider had the same significance. Although the general release of the Debtor had been inserted at the insistence of its own officers and counsel (R. 271, 281), the Debtor could obviously not object to landlords proving claims for debts allowable under the law as it then stood, for the Debtor would thereby be discharged therefrom, and its only real concern was as to a possible ultimate composition or reorganization.

(ii) *The application of the qualifying riders to future rent claims.*

The parties to the release agreements had also in mind the possibility of future rent claims being treated as provable debts under the law as it then stood. Admittedly, the weight of authority in the lower federal courts was to the contrary, but it was not until February, 1934, that this Court finally ruled (in a case growing out of this very proceeding) against the provability in bankruptcy of claims

[8]The same is true of every one of the ten landlords who appeared below as *amici curiae* in support of the petitioner's cause.

for future rent (*Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320). Without excepting "provable claims" from the release, no landlord would have been in a position to urge subsequently (as the petitioner *Whitcomb* actually did—R. 320) that the doctrine enunciated by this Court in *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581,—*i.e.* allowing damages for anticipatory breach through bankruptcy of a personal contract—should be applied to leases of real property.

(iii) *Inconsistency of the theory that the riders were intended to nullify the release provisions to which they were attached.*

Not only does the construction of the qualifying rider contended for by the petitioners put the rider in direct conflict with the terms of the agreement which it was supposed to modify, but it is wholly at odds with the natural probabilities of the situation. For example, there is no reason in the world why, having once insisted upon a general release, the Debtor should have later consented to the addition of a qualifying rider which nullified the release.

Any such conflicting result was in fact expressly provided against by the additional clause in the rider that it should "not be deemed to render any claim a provable claim which *is* not otherwise such".

(iv) *No legislation on the subject of landlords' claims was pending in Congress at the time.*

As a matter of fact, although the petitioners' brief suggests (at p. 29), and the dissenting judge below found (R. 377), that "remedial legislation" as to landlords' claims

was under consideration by Congress at the time that these assignment and release agreements were being negotiated and executed, such was not the fact.

The agreements were executed between October 19, 1932 and December 3, 1932. At that time, proposed legislation looking to amendment of the Bankruptcy Act with a view to the adoption of reorganization provisions of the same *general* character as those later incorporated in Section 77B, was before the Congress. However, *none of the bills then before Congress contained any provision relating to landlords' claims.*[9] It was not until December 29, 1932, that Representative McKeown introduced a bill (H. R. 13995) providing generally that all claims of whatever character against the Debtor or its property should be provable in the reorganization proceedings provided for by such bill, whether or not such claims would otherwise constitute provable claims under the Bankruptcy Act. This bill was subsequently reintroduced on January 10, 1933, as H. R. 14133, and was thereafter combined with H. R. 14359, the bill which eventually became Sections 73 to 77 of the Bankruptcy Act. The corporate reorganization section contained in the bill last mentioned was dropped in the Senate, however, to expedite passage of the other provisions before adjournment of the 72nd Congress in March, 1933.

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[9]On February 24, 1932, Senator Hastings had introduced a bill (S. 3886) for amending the Bankruptcy Act to provide for corporate reorganizations. A similar bill (H. R. 9968) was introduced by Representative Michener on March 1, 1932, and on June 15, 1932, Senator Hastings introduced still a further bill on the same subject (S. 4921). None of these bills made reference to future rent claims.

The language in these riders had been adopted by the Trustee early in October, 1932 (R. 149) and, of course, referred to "the law then in force" (*McCullough* v. *Virginia*, 172 U. S. 102, 112). This same language followed in all riders used thereafter. The petitioners themselves make a point of this, arguing (at p. 23 of their brief) that; because the Trustee adopted the language, it should be construed against the Trustee. But, however construed, it was written at a time and in the light of circumstances three months prior to the first introduction in Congress of any bill relating to the provability of landlords' claims in bankruptcy or reorganization proceedings.[10] Indeed, the petitioners' brief, notwithstanding the emphasis placed upon future legislation, finally recognizes that there were no amendments to the Bankruptcy Act affecting landlords then

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[10]On January 5, 1933, Representative Celler introduced a bill (H. R. 14062) for amending Section 63 of the Bankruptcy Act to make provable future rent claims by providing that an adjudication in bankruptcy should constitute an anticipatory breach of the unexpired leases of the bankrupt. The petitioners' brief in another connection (at p. 15) refers to the remarks of Congressman Celler with regard to this bill made on January 6, 1933 (76 Cong. Rec., Part II, p. 1518):

> "Mr. Speaker, I have introduced a bill to amend the bankruptcy act to prevent the *recurrence* of such scandals as grew out of the United Cigar Stores bankruptcy.
>
> * * * * * * * *
>
> "In the United Cigar Stores bankruptcy the Irving Trust Co. countenances this enforced *cancelation* in the case of 860 leases * * *."

Implicit in these remarks is the assumption that the United Cigar landlords had irrevocably lost their rights to relief, due to the character of the existing law, and that the cancellation of such leases was a *fait accompli*.

pending at the time when the qualified releases were given, but claims that "it was generally believed" that there *would be* amendments "which would include relief for landlord creditors". The petitioners submit no facts, either within or outside the record, to support this statement of "general belief"; and we emphatically deny it.

Indeed, until February, 1934, when this Court decided *Manhattan Properties, Inc.* v. *Irving Trust Co.* (291 U. S. 320) contrary to the provability of future rent claims in bankruptcy, most of the efforts to obtain recognition of landlords' claims were focused on the courts. It was not until the existing law was authoritatively construed against them that landlords generally shifted their attention to the legislature.

(v) *Parties are not presumed to have contracted with a view to future changes in the law. And had that been the intention of these parties, they could easily have expressed it.*

As the court below remarked, the parties cannot be presumed to have been

> "contracting on the basis of a mere guess both as to the fact of any actual change in the statute and as to what it would be" (R. 396).

The same thought was expressed by the Court of Queen's Bench in *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 186:

> "* * * there is nothing 'to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law * * * but people in general

> must always be considered as contracting with reference to the law as existing at the time of the contract. * * * And the words shewing a contrary intention ought to be pretty clear to rebut that presumption.' To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made."

If the parties had been so minded, it would have been an easy matter to have contracted for the contingency of which the petitioners now seek to take advantage. No better proof of this can be found than the testimony of the sole witness on the subject of the landlord's intention at the time. The petitioner Lorch had a substantial claim against the Debtor for back taxes in arrears since 1930, the payment of which his attorney tried to make a condition to the execution of the assignment agreement (R. 308). Failing this, the attorney advised Lorch to execute the assignment agreement containing the general release with the usual form of qualifying rider. Two and a half years later, however, this attorney testified that he had in mind to reserve for his client "*any* claims which might arise dependent upon *future* circumstances" (R. 307). Had such in fact been his intention, or the intention of any other of the petitioners, it would have been a simple matter to insert this very language in the agreements which now bar their claims.

The clause could have been thus adapted by the omission of the bracketed words, and the insertion of the few italicized words, in the following quotation:

> "Nothing in this Article shall be deemed a waiver by the landlord of the right to prove against

the Bankrupt Estate *or the Bankrupt* any [provable] claims to which [the Bankruptcy Court may adjudge] the landlord [is] *may be or become* entitled *under the Bankruptcy Act,* [but this shall not be deemed to render any claim a provable claim which is not otherwise such or to relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance]."

So adapted, the clause would have been thus simplified:

"Nothing in this Article shall be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate or the Bankrupt any claims to which the landlord may be or become entitled under the Bankruptcy Act."

POINT III

REGARDLESS OF THE CORRECT INTERPRETATION OF THE RIDER, ALL THE PETITIONERS (EXCEPT *RUBEL* AND *LIVINGSTON*) ARE BARRED BY THE ASSIGNMENT AGREEMENTS, WHICH IN THEIR CASES WERE NOT QUALIFIED BY THE RIDER.

(A) By accepting assignments of their leases from the Trustee and the Debtor, and (except in the *Munk* case) by assuming all obligations thereafter to be performed by the Debtor, these 7 petitioners relinquished any further rights against the Debtor.

Each of the agreements entered into by these seven petitioners provided for

(i) the assignment by the Debtor to the landlord of the lease and the subleases made thereunder, together with the rents received, accrued and to accrue after bankruptcy,

and each of these seven agreements, except the Munk agreement, also contained

(ii) an assumption by the landlord of the Debtor's obligations under the lease.

On the face of these agreements it can scarcely be contended that the petitioners' leases were intended to or did survive against the Debtor for any purpose. The legal effect of such agreements (quite apart from the release clause) was definitely to bring to an end the Debtor's obligations as tenant, and the assignment of the lease and the turn-over of the property to the landlord in each case provided all the elements of a surrender both by express agreement and by operation of law. *Beall* v. *White*, 94 U. S. 382, 389; *McAdam on Landlord and Tenant*, §§ 318, 322; *Tiffany, Real Property* (2d Ed.) § 431.

As to surrender by agreement, there was clear intention on the part of the Debtor to relinquish all interest in the leasehold from the effective date of the agreement (September 1, 1932), coupled with expressed willingness of the landlord to take back his property. Moreover, as a matter of law, by taking over the sub-tenancies and thereafter treating the property as freed of any interest of the Debtor, the landlord was conducting himself in a manner wholly inconsistent with the continuance of lease liability on the part of the Debtor. *Lamson Consol. Store Service* v. *Bow-*

land, 114 Fed. 639, 641 (C. C. A. 6th); *In re Sherwoods, Inc.*, 210 Fed. 754, 759 (C. C. A. 2d).[11]

Moreover, in each case (except *Munk*), the unqualified assumption of all of the Debtor's obligations under the lease left the petitioner both the obligor and the obligee of the claim which he now asserts.

(B) The petitioners are in error in suggesting that the rider qualifying the release serves no function unless, contrary to its terms, it be treated as applying as well to the assignment and assumption provisions.

The qualifying rider in each case (except *Rubel, Livingston* and *Munk*[12]) is expressly limited in its effect to the article of the agreement containing the general release, viz.:

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[11]The petitioners suggest that the assignment agreements did not constitute surrenders because of the intention of the parties to preserve the subleases. But the decision on which they rely, *Metropolitan Life Ins. Co.* v. *Hellinger,* 272 N. Y. 24, only stands for the proposition that where a tenant assigns his subleases to the overlandlord a *merger* will not be inferred. There is, however, no principle of law that prevents a tenant, when turning over subleases to his overlandlord, from obtaining the benefits of the release from liability which ordinarily arise from surrender. Beginning with the leading case of *Eten* v. *Luyster,* 60 N. Y. 252, the New York courts have consistently held that upon surrender of the head lease the subtenant "becomes the immediate tenant of the original lessor" and the interest of the subtenant of the lessee continues as if no surrender has been made. As Judge Cardozo said in *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 37, as far as the sublessees are concerned, the surrender of the head lease is "equivalent to a transfer of the reversion".

[12]In the *Munk* case, the qualification, although applicable to the assumption clause as well as the release clause, did

> "Nothing in this Article [here was inserted the number of the article containing the release] shall be deemed a waiver by the Landlord of the right to prove * * *" (See R. 76).

Thus, the rider did not qualify the effect of the surrender of the lease as a result of its assignment back to the landlord.

The dissenting judge in the Circuit Court of Appeals completely nullified this distinction by the italicized words in the following sentence of his opinion:

> "Not only did the statement in the rider that there was 'no waiver by the landlord of the right to prove against the bankrupt estate any provable claim' limit the general release, but the rider cannot have the meaning intended unless it be taken to reserve against the bankrupt's estate any claims but for *the surrender and* general release" (R. 377—83 F. [2d] at p. 207).

Yet, under the rule that each phrase in a contract must be given effect (*O'Brien* v. *Miller,* 168 U. S. 287, 297), it would seem clear that, whatever the consequences, the qualification upon which the petitioners rely cannot be construed to be a qualification of the assignment provision of their agreements.

The argument to the contrary is that, if the qualification be limited (as it certainly is by its terms) to a qualification of the release provision alone, then it has no meaning

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not apply to the assignment clause. The *Rubel* and *Livingston* claims are, therefore, the only claims here involved whose disallowance depends solely upon a construction of the release, as distinguished from a determination of the effect of the entire agreement of which the release formed but a part.

at all, as its effect is entirely destroyed by the independent assignment provision.

But this is not so.

The assignment provision did not relieve the Debtor or its bankrupt estate from such claims as had already become provable in bankruptcy, notably claims for rent accrued prior to bankruptcy. Neither did this provision bar the assertion of future rent claims based on the theory (not finally rejected by this Court until 1934) that bankruptcy constituted an anticipatory breach of leases, as well as of contracts affecting personality, (*cf. Central Trust Company* v. *Chicago Auditorium,* 240 U. S. 581). Both types of claims might be proven irrespective of a surrender by assignment. But the release article released the Debtor and the bankrupt estate from *all* claims, whether then in existence or to accrue in the future.

Accordingly, the qualifying rider served the vital function of negativing the waiver of the landlord's right to assert already existing claims. Without the rider such claims would be cut off because of the release clause, but not because of the assignment clause. With the rider the release cut off all existing claims which were not *then* provable.

POINT IV

THE QUESTION WHETHER THE REJECTION OF A LEASE CONSTITUTES *WITHOUT MORE* THE BASIS OF A CLAIM UNDER THE STATUTE HAS ALREADY BEEN CONSIDERED IN THE *CITY BANK FARMERS TRUST COMPANY* CASE (NO. 260).

The petitioners devote considerable space in their brief to the proposition that the Circuit Court of Appeals erron-

eously construed the provisions in Section 77B relating to landlords' claims. The essence of their argument is that in limiting the landlord to "a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (R. 373), the court below overlooked the alternative claim provided by the statute "for injury resulting from the rejection of an unexpired lease".

The petitioners, therefore, invite the Court to consider the question whether the rejection of a lease constitutes the basis of a claim under the statute, irrespective of continued liability on the part of the Debtor under the substantive law of landlord and tenant. The Trustee's position with respect to this question is set forth in its brief in the *City Bank Farmers Trust Company* case (No. 260), which has been assigned for argument in advance of this case.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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APPENDIX

Statute Involved

"The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. For all purposes of this section unsecured claims which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition or answer under this section, shall be entitled to such priority, and the holders of such claims, and of other claims, if any, of equal rank, shall be treated as a separate class of creditors. In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity

with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." (Bankruptcy Act of July 1, 1898, as amended, Section 77B (b) (10); 11 U. S. C. A. Sec. 207 (b) (10).)

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OCTOBER TERM, 1936.

No. 436.

IN THE MATTER

of

UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR.

ABE SCHWARTZ, *et al.*,

Petitioners,

v.

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*

SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION, AND PETITION FOR REHEARING

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Supreme Court of the United States

OCTOBER TERM, 1936.

IN THE MATTER *of* UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ABE SCHWARTZ, *et al.*, *Petitioners*, v. IRVING TRUST COMPANY, as Trustee OF UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*	No. 436.

SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION, AND PETITION FOR REHEARING.

SUMMARY STATEMENT

To prevail in this case, the petitioners had to sustain two positions, (1) that surrender of their leases, as accomplished by the assignment agreements, did not terminate their rights to prove under a *subsequently enacted* statute, and (2) that such rights were preserved by the qualifications to the general releases which otherwise would have barred the claims regardless of such statute. The decision in favor of the petitioners on the first point followed necessarily from the decision in the *City Bank Farmers Trust Company* case (No. 260), which we accept as final. The only considera-

tions herein presented relate to the second point. C that, the decision involved a single isolated clause (the so-called "qualified release clause") in a contract or group of contracts, and did not involve any fundamental question of Federal or other law.

The Court evidently considered that the claims *sub judice* were the only ones involving this clause that were presented in this estate;[1] whereas, in fact the clause appears in contracts affecting 118 leases of the Debtor, of which 44 (including the 9 present cases) are the basis of claims pending in this proceeding.[2] The aggregate of these 44 claims (on the three years' rental basis) is upwards of $3,500,000, and it may well be that the full three years' rental will be recoverable in most of the cases, as they involve long term leases.

Your petitioner, although well aware that considerations of great weight in the orderly administration of judi-

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[1]The relevant language of the Court's opinion is:

> "Ninety-four landlords who had re-entered the demised premises, pursuant to such agreements, during the pendency of the original bankruptcy, filed claims in the reorganization proceeding. From the District Court's disallowance of the claims all the claimants joined in a single appeal to the Circuit Court of Appeals.".

This was not in substance a case of 94 single claimants joining in a single appeal, as all the 94 claimants were, from the beginning, represented by a single set of attorneys who were presenting all of these claims from the beginning as a unit. But there were altogether upwards of 600 landlords who had executed releases, and upwards of 100 landlords whose releases were qualified by riders of the type concerned in the present case.

[2]In addition there is the possibility that some or all of the other landlords (whose claims, if allowed, might aggregate over $2,500,000) may seek to file claims after the bar date. One such landlord has already petitioned for leave to file a late claim, basing his petition upon the decision of this Court in this case.

cial procedure dictate that ordinarily petitions for rehearing to this Court should not be granted, and therefore accepting as final and irrevocable the adverse decision of this Court on the important legal questions determined in the case of *City Bank Farmers Trust Company* v. *Irving Trust Company* (No. 260), yet respectfully submits that the above-entitled case (*Schwartz* v. *Irving Trust Company,* No. 436) is so unusual as to call for further consideration.

It is submitted, firstly, that in any event (*i.e.* accepting the decision as right) there should be modifications in the statement of facts in the opinion, and secondly, that there should be a rehearing as to the decision itself.

SUGGESTED REVISIONS IN THE STATEMENTS OF FACT IN THE COURT'S OPINION

I.

The following sentence in the first paragraph of the Court's opinion appears to call for modification:

> "Some of the leases contained indemnity covenants similar to that considered in No. 354; one lacked any stipulation for damages or indemnity, as did the lease which gave rise to the claim in No. 260."

In point of fact, *each* of the leases contained a stipulation for indemnity.[3] It is respectfully submitted that this sentence should, therefore, be amended to read:

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[3]Schwartz—R. 67e, fol. 201e; Munk—R. 82, fol. 245; Lorch—R. 132, fol. 395; Nunn—R. 174, fol. 520; Livingston—R. 184, fol. 552; Brown—R. 206, fol. 618; Rubel—R. 224, fol. 671; Whitcomb—R. 233, fol. 699; and Excell—R. 246, fol. 737.

"Each of the leases contained an indemnity covenant similar to that considered in No. 354."

The point is of substantive importance, as the Court's decision may then properly be based upon the grounds,

(1) that, regardless of whether these leases were rejected, as each contained an express covenant of indemnity, they are all entitled to the benefit of the statute when construed to apply retroactively (as it was construed in the *City Bank Farmers* case, No. 260, the decision in which we are not asking the Court to reconsider), and

(2) that in each of the contracts affecting these leases the rider qualifying the general release was sufficient to reserve the right to prove such claim on the indemnity covenant.[4]

II.

If so corrected, the Court's opinion would not support the hypothesis that the Court's *decision* was based upon a determination that each of the landlords had a claim for injury arising from the *rejection* of his lease by the Trustee in the prior bankruptcy proceeding (in addition to, and exclusive of, such claim on the indemnity covenant). We do not dispute (in view of the decision in the *City Bank Farmers Trust Company* case, No. 260) that the law is that any landlord who has been injured by *rejection* by the Trustee in a prior bankruptcy proceeding *may* have

[4]Our petition for rehearing asks for a review on this latter point, but for the purpose of suggesting this particular correction in the Court's opinion we accept it.

a claim on that ground alone, whether or not his lease contains a covenant for damages or indemnity. But there is no ground for the assumption in this case that *each of these nine claimants* had had his lease *rejected.* On the contrary, *it is expressly stipulated* that in four of the cases the lease had *not been rejected* by the Trustee. See Schedule A to the Stipulation, R. 321.

Therefore, it is respectfully submitted that the third sentence of the opinion should be stricken, to-wit, the following sentence:

> "As in Nos. 260 and 354, *ante,* their leases were rejected in a bankruptcy proceeding pending when the reorganization section was adopted."

It may, of course, be argued that, although there was no rejection in fact, a rejection within the meaning of the statute may be implied in law from the fact that the Trustee had not expressly elected to affirm. In fact, just such a contention is now being urged on behalf of certain landlords before the court below in cases which require a determination of the question. However, we cannot believe that this Court intended to pass on that question in this case, for the following reasons:

(1) The question is an important question of Federal law, particularly as the word "rejection" in Section 77B had not received any prior judicial definition.

(2) Determination of the question was not necessary to a decision.

(3) There is no discussion of the question in the opinion of the Court in this case or in any one of the three companion cases decided together with this No. 436.

(4) The question was not argued at all at the bar.

(5) The question was not argued in any brief, except a reply brief filed after the argument, and to which we had no opportunity to respond.[5]

(6) The argument that four leases were rejected was made in the teeth of a stipulation that they were not rejected.

As already pointed out, the deletion or correction of the above-mentioned two sentences in this Court's opinion would not affect the result of this Court's decision.

However, the Trustee most respectfully submits that the decision in this particular case was wrong, and, therefore, further petitions for a rehearing.

GROUNDS FOR PETITION FOR REHEARING

The Trustee accepts the decision in the *City Bank Farmers Trust Company* case, No. 260. That case involved an important and fundamental *question of law*, which was peculiarly appropriate for determination by this Court. We bow to the result.

The present case (No. 436), on the other hand, is, so far as principles of law are concerned (as distinct from the importance of the case in its application to this particular estate), of much less importance. This is recognized in the first paragraph of the opinion of the Court, in which the present case is referred to as merely a "variant" of the *City Bank Farmers Trust Company* case. The question in

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[5]It is said in that brief, in extenuation of its late filing, that our answering brief was not served until the day the landlords' counsel left for Washington. It was served in final form on Saturday, December 12, and the case was not argued until Wednesday, December 16. Proofs of our brief, substantially in final form (except as to the argument on the two-court rule), had previously been served on the landlords' counsel.

No. 436 is a question involving only the construction of a particular clause in a particular contract or group of contracts.

The effect of the Court's decision in respect of this single contract clause has been to alter completely the complexion and extent of the claims provable in this estate. When it is realized that this result has been reached by this Court on what is peculiarly a question of fact (the intent of the parties in executing the clause in question), and that that question of fact has been determined adversely to the concurrent findings of the Special Master, the District Court and a majority of the Circuit Court of Appeals, the result appears to be of a character so unusual and far-reaching as to justify a review on rehearing.

On rehearing, an opportunity would be given to the Trustee to press upon this Court considerations which are not mentioned in the opinion, to-wit, the volume of evidence in the record showing the intent of the parties at the time of the drafting and adoption of this qualifying rider.

The record shows concretely that the qualifying rider in question was adopted so that there might be preserved to the landlord the right to assert claims for back rent and/or taxes which were provable under Section 63a of the Bankruptcy Act as it then (in 1932) stood and which otherwise would have been lost through the effect of the general release. As an example, take the testimony of the Trustee's representative in charge of this estate (R. 271):

> "Q. What happened in the case of a landlord who had a claim for back rent or taxes which had not been paid? A. Well, in that event we instructed our representatives that they could insert a rider which modified this release and gave the landlord the right to prove any claim that he had which was a provable claim in bankruptcy * * * ".

Again, the documentary "Instructions" to the Trustee's representatives engaged in the negotiation of the releases, contained the following explicit statement of the purpose of the paragraph in question (R. 19):

> "Although it is understood that the Bankrupt Company paid rent falling due on the 1st of August or during the month of August prior to the bankruptcy, there may be cases in which there were amounts owing under the lease at the time of the bankruptcy in respect of back taxes and similar items. In such cases you should insert in the agreement the additional paragraph to the effect that the releases contained in the agreement do not constitute a waiver of the landlord's right to prove any provable claims which he may have. The purpose of this additional paragraph is to give the landlord a right to prove against the bankrupt estate any provable claims, if he has any, but it does not, of course, relieve the landlord from the necessity of proving and obtaining the allowance of such claims or preclude the Trustee from contesting such proof and allowance."

Other evidence of a similar character appears in the record, and it is respectfully submitted that none will be found to the contrary.[6]

The opinion of the Court states that:

> "The special master found, and it seems to be conceded, that the reservations were intended to preserve claims for future rent or for indemnity for loss of future rent."

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[6]Except perhaps the testimony of an attorney (Petacque) for one of the petitioners which, on analysis, appears to be clearly discredited. (Compare R. 307, fol. 921 with R. 281, fol. 841 and R. 288, fol. 864.)

Nothing is said in this sentence, or elsewhere, as to the claim for back rent or taxes which was the real cause for the adoption of the rider. Yet it is significant that the Special Master opened his consideration of these riders (R. 329, fol. 987) with the following paragraph:

> "In a limited number of cases it became necessary to add typewritten riders to the agreement which reserved the right 'to prove against the Bankrupt Estate any provable claim to which the Bankruptcy Court may adjudge the Landlords entitled to'. This was particularly true in the Chicago area in cases where the landlords had a net lease, namely, where the Bankrupt had agreed to pay the land taxes. The tax situation in Chicago at that time was in a snarl, the amount to be paid by the Bankrupt was uncertain, and naturally the general release was qualified as not to include these taxes or any provable claim which the Landlord then had against the Bankrupt Estate."

Taken together, the decisions in Nos. 354, 260 and 436 present this remarkable paradox. In the first two, this Court settled fundamental questions of law under which the provability of several million dollars of landlords' claims, which had previously been allowed by the lower courts, is authoritatively established. In the third—the instant case—the Court did not settle any important question of law (unless the one as to the meaning of "rejection" which, as already pointed out, was not argued), but merely reversed a concurrent finding by two Courts below as to the meaning and intent of a contract provision. The exercise by this Court of its power to reverse under such circumstances is so rare as to give rise to the assumption that impelling motives have compelled it. Yet here the exercise appears to have been in the teeth of the substantially un-

disputed evidence in the record. And the effect of the exercise has been seriously to dilute the claims of the very landlords the legitimacy of whose claims had just been settled by this Court in the exercise of its normal power of appellate review of important questions of law.

We respectfully submit that, before this result becomes final, this Court should afford an opportunity for thorough argument before it on the precise question which has thus become so vitally important to the whole estate and to those interested in it,—the meaning and intent of the contract in question. Our suggestion is that, before the reversal of the concurrent lower Courts on this precise question becomes final (with all its attendant and decisive effects in this estate), the Court give a further and final opportunity for an argument before it on the relevant facts in the record.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, that it has merit in both law and fact, and that it is deserving of the consideration of the Court.

Dated, January 23, 1937.

WM. D. WHITNEY.

SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1936.

Abe Schwartz, et al., Petitioners,
vs.
Irving Trust Company, as Trustee of United Cigar Stores Company of America, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 4, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The provability of certain landlords' claims in proceedings under Section 77 B of the Bankruptcy Act is here drawn in question. The petitioners were lessors of the debtor. ~~As in Nos. 260~~

Their leases were rejected in a bankruptcy proceeding pending when the reorganization section was adopted. All of the leases contained indemnity covenants similar to that considered in No. 354.

in the present case is the contention that prior to initiation of the 77 B proceeding, the petitioners bargained away any valid claims they had against the debtor and its assets.

In August 1932, when United Cigar Stores Company was adjudicated a voluntary bankrupt, there were in force about one thousand leases under which it held real estate. In some cases the trustee desired to retain the demised premises under a new lease for a shorter term, or at a lower rental, or both. In others where the company occupied and used but a part of the premises and sublet the balance, the trustee desired the abrogation of the lease as to that portion which United had sublet, and a new lease covering only the portion used by United. In certain instances where the company was lessee and sole occupant, or occupied a part and sublet a part, or had sublet the entire premises, the trustee wished to be rid of the leasehold.

In order to deal with these varying situations the trustee presented appropriate forms of agreement to landlords, many of whom

executed them. Ninety-four landlords who had re-entered the demised premises, pursuant to such agreements, during the pendency of the original bankruptcy, filed claims in the reorganization proceeding. From the District Court's disallowance of the claims all the claimants joined in a single appeal to the Circuit Court of Appeals. That court found that each of eighty-two claimants, in connection with the transfer of possession of the premises, or the modification of the existing leases, gave a general, unqualified release to the trustee, individually and as trustee, to the bankrupt and to the bankrupt estate, of all claims under the leases or in respect of rent. Three, so the court found, gave releases containing reservations which were not broad enough to preserve claims provable under Section 77B.

The court held that the releases executed by these eighty-five landlords were not procured by duress or misrepresentation, were for a valid consideration, and extinguished all claims the releasors might have had. As respects the remaining nine claims, the court divided, a majority holding the agreements the landlords executed, and what was done pursuant to the agreements, amounted to a surrender under state law and therefore deprived the claimants of the right to prove, and one judge holding that whether or not surrenders had occurred under state law the form of the agreements reserved claims against the debtor's assets in the reorganization proceeding.[1]

All ninety-four claimants petitioned this court for review by certiorari. We granted the writ to the nine last mentioned.

In each of the cases under consideration surrender and repossession of the premises was pursuant to an agreement between the claimant, as lessor, the respondent, as trustee, and the United Company. After describing the lease, reciting the state of the title thereunder, the bankruptcy proceeding, and the authority granted the trustee by the court to reject the lease, the contract contains these provisions: The trustee assigns to the lessor its right, title, and interest in and to the lease and any subleases; the bankrupt does the same, and also assigns its right to any rent accrued and to accrue under subleases; the trustee agrees to pay to the landlord any rents received from subtenants by it as receiver or trustee, less certain costs; the landlord assumes all existing and future

[1] *In re United Cigar Stores of America* (Joseph E. Otis Estate Land Trust, et al., appellants), 83 F. (2d) 202; on rehearing 85 F. (2d) 11.

obligations, terms, and conditions of and under the lease and any sublease which would be performable by the bankrupt or the trustee. By article Fifth the landlord releases the trustee (individually and as receiver and trustee), the bankrupt estate, and the bankrupt from any and all liability of any nature with respect to the lease and the subleases and with respect to the premises, including all claims of the landlord in respect of rent or use or occupation. To each agreement a rider prepared by the trustee was attached at the insistence of the landlord. In most of the cases the rider was substantially in the following form:

"Nothing in this Article 5 shall be deemed a waiver by the Landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or to relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance."

In one the form was:

"It is, however, expressly understood and agreed that the said Landlord does not waive any right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. All such provable claims shall not be affected by this agreement."

The special master to whom the matter was referred conceded that the riders were intended to preserve claims for future rent, but thought them effective to save only claims the provability of which resulted from a favorable court ruling and that claims rendered provable by subsequent legislation were not within the reservation. The District Court approved the master's report. A majority of the Circuit Court of Appeals held the agreements constituted surrenders, which, according to state law, terminated all rights of the landlords against the tenant, and no claim is provable under Section 77 B, unless it is a continuing and subsisting claim against the debtor, recognized by the substantive law of landlord and tenant, that is, by the applicable state law. The riders were

construed to be qualifications of the Fifth article only, which was the general release. As there was, in this view of the agreements, no right or claim to be released, a reservation or restriction applicable only to the release amounted to nothing. The dissenting judge agreed that the contracts operated as surrenders but held that the riders were not limited in their operation to the release clause alone but were applicable to the entire contract and were intended and effective to reserve claims which might be found to be provable, despite surrender, either as the result of future judicial decision or future legislative action.

1. We refused to grant certiorari in the case of the eighty-five claimants each of whom, for a consideration, bargained away all claims, present or prospective, against the bankrupt, the trustee, and the estate. We agree with the court below that, under well settled principles, their releases preclude proof of claims for future rent or for indemnity.

2. We have held in *City Bank Farmers Trust Company* v. *Irving Trust Company*, (No. 260, decided this day) that surrender by the trustee, acceptance by the landlord, reentry, and the exercise of dominion over the demised premises by the latter after rejection of the lease, do not deprive him of a provable claim in proceedings under Section 77B for injury due to rejection of his lease or upon the covenant of indemnity found in the lease. It follows that, except for the release, which was a part of each of the agreements, the petitioners would have provable claims.

3. We do not agree, therefore, that if the earlier paragraphs of the agreements worked a surrender (which we do not decide) nothing was left upon which the final release clause could operate. An absolute release would have been a bar to claims for future rent or for indemnity.

4. As we have seen, each of the releases was qualified by a rider which reserved "the right to prove against the Bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled". A majority of the court below thought that these riders applied only to the release clause. The dissenting judge thought that they purported to reserve all claims provable as a result of judicial decision or amendment of the statute which might otherwise be lost by the execution and performance of the agreements and that they were effective for that purpose notwith-

standing the earlier paragraphs of the agreement amounted to a surrender under state law. We think this is the correct view of the meaning and effect of the reservations. The language in which they are couched is broad enough to include claims under Section 77B. They reserve the right to prove against the bankrupt estate any provable claims to which the bankruptcy court may adjudge the landlord is entitled. The bankrupt estate, to which the reservations refer, consists of the property which formerly belonged to the bankrupt and, upon adjudication, came into the custody of the bankruptcy court. It still remains there. Claims for future rent are specifically made provable by Section 77B (b) (10). The court having charge of the reorganization proceeding is a bankruptcy court. Section 77A provides: "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in Section 77B of this Act." Proceedings in reorganization under Section 77B are "proceedings in bankruptcy".[2] They may be initiated in a pending bankruptcy proceeding by the express terms of subsection (*p*). The petitioners are creditors and their claims are provable by the express terms of the section; the estate against which the petitioners reserved all provable claims is the same estate which was within the jurisdiction of the bankruptcy court at the time the agreements were executed.

The special master found, and it seems to be conceded, that the reservations were intended to preserve claims for future rent or for indemnity for loss of future rent. But the master held, and the majority of the Circuit Court of Appeals agreed, that their scope was restricted to claims provable as a result of judicial decision and did not extend to claims made provable by legislation. The language used does not so limit them. The most that can be said is that there was serious question whether such claims could be proved under the law as it stood when the agreements were executed. For whatever they were worth the petitioners desired the reservations so that they might possibly make good claims for injury done and loss incurred by the abrogation of their leases. If amendatory legislation was adopted the bankruptcy court might, pursuant thereto, adjudge them entitled to allowance of a claim.

[2] *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 165.

We think the operation of the saving clause cannot be limited by the fact that the claims are described as those to which the bankruptcy court may adjudge the petitioners entitled. That court's adjudication would necessarily follow and apply any amendment of the Act. We hold, therefore, that the reservation was broad enough to preserve the right to prove whatever claims were provable and allowable either by judicial decision or supplementary legislation. It follows that the petitioners' claims are provable.

The decree below must be reversed and the cause remanded to the District Court for further proceedings in conformity to this opinion.

So ordered.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.